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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID J. LEE, and DANIEL R. LLOYD,)
as individuals and, on behalf of others)
similarly situated,)

Plaintiffs,)

vs.)

AMERICAN EXPRESS TRAVEL)
RELATED SERVICES, INC., a New York)
corporation, AMERICAN EXPRESS)
CENTURION BANK, a Utah corporation,)
AMERICAN EXPRESS BANK, FSB, a)
Utah corporation, and DOES 1, through)
100, inclusive,)

Defendants.)

Case No.: C 07-4765 CRB

Complaint For: Injunctive And
Restitutionary Relief Arising From
Violation Of California Bus. & Prof.
Code §§ 17200, et seq.; Injunctive and
Restitutionary Relief, Punitive
Damages Arising From Violation of
California Civil Code § 1770 (a)(19);
Fraud And Deceit; And, Declaratory
Judgment

CLASS ACTION

Plaintiffs allege:

I.

Introduction

1. The action deals only with American Express charge cards and credit cards, respectively, for which an annual fee is paid by the card holder and with American Express Gift Cards and Be My Guest Dining Cards {“Dining Card”), respectively, which are purchased for a fee. It presents three overarching issues:

(a) Did American Express commit fraud in the inducement of the card holder agreement arising from its practices and knowing misrepresentations as to the legality and conscionability of the card agreements or portions thereof (excluding the arbitration provision) that were relied upon by Plaintiffs and the persons whom they seek to represent in entering into the agreement and making fee payments thereunder?

(b) As a separate matter, do the card holder agreements drafted by American Express (and excluding any reference to the arbitration provisions they contain) contain unconscionable and illegal terms in violation of various California consumer protection statutes entitling Plaintiffs to statutory remedies?

(c) Is the arbitration provision drafted and inserted by American Express in its card agreements (without reference to the unconscionability of the card agreement itself) unconscionable or illegal, and thereby in violation of various California consumer protection statutes entitling Plaintiffs to statutory remedies?

In each instance and as a result of the unconscionability and illegality of the arbitration provision and entire agreement, respectively, that make one or both unenforceable, the fee-paying card holder suffered damage by receiving something worth monetarily less than that for

1 which he/she contracted and paid (as well as by the loss of use of the fee following its payment).

2 In the context of California's consumer protection laws, Plaintiffs were thereby damaged and
3 suffered an "injury in fact" and a "loss of money or property" entitling them to statutory relief.

4 In the context of the fraud cause of action which is made only with regard to the agreement as a
5 whole (excluding the arbitration provision),¹ receiving less than that for which they paid is the
6 requisite injury necessary to give rise to a right of rescission and restitution, in whole or part, of
7 the fees paid.

8 2. The payment of the fee for the respective card(s) provides Plaintiffs and similarly
9 situated persons a contractual right to mandatory arbitration that has pecuniary value: i.e., the
10 right to demand (pursuant to an enforceable arbitration agreement) mandatory arbitration of any
11 "claim" they have against American Express and the business/person supplying the goods or
12 services for which payment was made using the charge card or the credit card or the gift card or
13 the dining card. However, the card holder received something worth monetarily less than that
14 for which he/she paid because of the unconscionability and illegality of American Express'
15 arbitration provision (an amount to which the value of the loss of the use of money paid as fees
16 must be added): e.g., rather than getting a legal and enforceable arbitration provision that
17 endows the card holder with the contractual and legal right to invoke mandatory binding
18 arbitration, they got only an unconscionable and illegal (and thereby unenforceable and invalid)
19 arbitration provision that they can not, as a matter of fact and law and public policy, invoke or
20 use against any one. That is the an "injury in fact" and results in a "loss of money" (which does
21 not constitute recompensable "damages" since "damages" are not allowed under the UCL and
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25 ¹ Unless otherwise specified, reference to the "card agreement" or "card agreement in whole" shall refer to and mean "card agreement excluding the arbitration provision."

1 are not sought under the CLRA causes of action) mandating that statutory restitution and
2 injunctive relief be ordered.

3 Relatedly and as a result of a recent amendment to the arbitration provision unilaterally
4 imposed on them by American Express, charge card/credit card/gift/dining card card holders
5 now get even less than that for which they paid since, under that amendment, if any one of
6 specified terms imposed by American Express in its “Restrictions” section (such as the class
7 action waiver, the injunction waiver, the non-consolidation of arbitral claims condition) are
8 successfully challenged and declared to be invalid and unenforceable then the arbitration
9 provision itself provides that the arbitration provision “shall not apply.” As a result, rather than
10 getting an enforceable and conscionable arbitration provision they get only a Hobson’s Choice:
11 i.e., in order to demand arbitration the card holder must either acquiesce to the use of an
12 unconscionable and illegal arbitration provision (a matter which is against public policy and the
13 law, and which also waives not only their right to object to its unconscionability but the various
14 non-waiveable rights they are given by California law and policy), or have no enforceable right
15 to demand arbitration at all. In each instance, Plaintiffs and similarly situated persons thus
16 suffer not only an “injury in fact” but also a “loss of money or property” as a result of the
17 provision’s unconscionability and illegality that also entitle them to statutory restitution and
18 injunctive relief.
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20 3. The scheme from which Plaintiffs’ “injury in fact” and resultant monetary loss results
21 with regard to the arbitration provision is the systematic and continuing violation of California’s
22 consumer protection laws resulting from the unconscionability and illegality of its terms. The
23 terms of that provision and, indeed, the provision itself is unconscionable and illegal in that it:
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1 ♦ was imposed on all card holders on a “take it or leave it” basis with no
2 opportunity by the card holder to negotiate any term thereof;

3 ♦ was contained in an adhesive form agreement prepared by American
4 Express and concerning which American Express was in a much stronger
5 bargaining position than the card holder;

6 ♦ provides that all claims “shall be arbitrated on an individual basis” and
7 that no claim “may be arbitrated on a class action basis or on bases involving
8 Claims brought in a purported representative capacity on behalf of the general
9 public, other Cardmembers [or “gift cardholders” or “dining cardholders”] or
10 other persons similarly situated” in a context where predictably only “small”
11 amounts of money are involved (the fee) and as part of a scheme to deliberately
12 cheat large numbers of its card holders out of the individually “small” amounts
13 represented by the fees paid for the card;

14 ♦ provided, until 2005, relative to credit cards and charge cards that an
15 arbitration is mandated of “any claim, dispute, or controversy arising from or
16 relating to your Account; this Agreement ... and any other related or prior
17 agreement that you may have had with us, or the relationships resulting from any
18 of the above Agreements (‘Agreements’), including the validity, enforceability or
19 scope of this Arbitration Provision or the Agreements”;

20 ♦ provides with regard to the gift card and the dining card that an arbitration
21 is mandated of “any claim, dispute, or controversy arising from or relating to your
22 Account; this Agreement ... and any other related or prior agreement that you
23 may have had with us, or the relationships resulting from any of the above
24 may have had with us, or the relationships resulting from any of the above
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1 Agreements (‘Agreements’), including the validity, enforceability or scope of this
2 Arbitration Provision or the Agreements”;

3 ♦ provides that “claims brought by you against us, or by us against you, may
4 not be joined or consolidated in arbitration with Claims brought by or against
5 someone other than you” in a context where predictably only “small” amounts of
6 money (the fee) are involved and as part of a scheme to deliberately cheat large
7 numbers of its card holders out of the individually “small” amounts represented
8 by the fees paid for the card;

9 ♦ provides a description of the term “us” relating to the non-card holder
10 parties by whom or against whom a claim can be made that must be arbitrated is
11 so vague and overbroad that it is patently insufficient to establish any reasonable
12 expectation or knowledge of the cardholder as to what matters and persons are
13 covered by the agreement;

14 ♦ provides that no injunctive relief may ever been given in that relief under
15 the agreement can be made only on “an individual basis” not involving “the
16 general public” since the decision maker’s “authority is limited to claims between
17 you and us [Defendants and amorphous others] alone” in which relief “is limited
18 to awards to you and us alone.”;

19 ♦ provides that all “claims of every kind and nature, including but not
20 limited to, initial claims, counterclaims, cross-claims and third-party claims and
21 claims based upon contract, tort, fraud and other intentional torts, statutes,
22 regulations, common law and equity” must be arbitrated;
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1 ♦ provides that in arbitration “[a]ny Claim shall be resolved ... by
2 arbitration pursuant to this Arbitration Provision and the code of procedure of the
3 national arbitration organization to which the Claim is referred in effect at the
4 time the Claim is filed. Claims shall be referred to either the National Arbitration
5 Forum (‘NAF’) or the American Arbitration Association (‘AAA’) [and with
6 regard to the dining card only, JAMS” without providing the card holder with
7 copies of the rules of those organizations or specifying which of several code of
8 procedure applies to the arbitration;

9 ♦ provides no alternative means by which some other arbiter or arbitral
10 organization may be chosen by the card holder;

11 ♦ provides that “[t]he arbitration shall be governed by the applicable Code,
12 except that (to the extent enforceable under the FAA) this Arbitration Provision
13 shall control if it is inconsistent with the applicable Code” but fails to advise of
14 any specific inconsistency those codes may have with the Arbitration Provision;

15 ♦ provides no way for the card holder to know at the time he/she initially
16 agreed to arbitrate what the rules would be at the time of the arbitration as well as
17 what inconsistencies existed between the agreement and the Code because
18 American Express has given itself the unilateral right to amend the arbitration
19 provision at any time (including before, during, or after any arbitration) and the
20 arbitration provision otherwise makes the applicable arbitration rules those in
21 effect when the arbitration is filed;

22 ♦ provides that “[n]o arbitrator’s award or decision will have any preclusive
23 effect as to issues or claims in any dispute with anyone who is not a named party
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1 to the arbitration” which is against public policy by denying any mutual collateral
2 estoppel or precedential value to any decision rendered against American Express;

3 ♦ provided, until 2005, that “[i]f any portion of this Arbitration Provision is
4 deemed invalid or unenforceable under any principle or provision of law or
5 equity, it shall not invalidate the remaining portions of this Arbitration Provision
6 or the Agreement, each of which shall be enforceable regardless of such
7 invalidity” even though all determinations as to severability of the provision is a
8 matter exclusively reserved for the Courts;

9 ♦ provides since 2005 that “should any portion of the “Restrictions on
10 Arbitration’ [section containing the class action waiver, the injunction waiver, the
11 no consolidation of arbitral claims term] be deemed invalid or unenforceable, the
12 entire Arbitration Provision (other than this sentence) will not apply” even though
13 all determinations as to severability of the provision is a matter exclusively
14 reserved for the Courts; and,

15 ♦ provides only a vague and overbroad statement of what effect arbitration will
16 have on the legal rights of card holders.
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18 4. The unconscionable and illegal terms of the arbitration provision is a continuing act or
19 practice: (a) in violation of California’s Unfair Competition Law, Bus. & Prof. Code §§ 17200,
20 et seq. (“UCL”), on the basis that the arbitration provision and its terms are unlawful and unfair;
21 and, (b) in violation of California’s Consumer Legal Remedies Act, California Civil Code §
22 1770(a)(19) (“CLRA”), which makes insertion of an unconscionable provision in a contract an
23 unlawful act. Plaintiffs, on behalf of themselves and/or all other similarly situated consumers
24 and residents, respectively, in California are thus entitled to: (1) a Declaratory Judgment
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1 declaring the arbitration provision to be unconscionable, illegal and unenforceable, and
2 severable from the remainder of the card agreement; (2) statutorily authorized injunctive and
3 restitutionary relief (including disgorgement of profits) as to the UCL causes of action; (3)
4 statutorily authorized injunctive and restitutionary relief, and punitive damages as to the CLRA
5 causes of action; (4) prejudgment interest; and, (5) attorney's fees (including costs) specifically
6 authorized by the CLRA, and otherwise available in UCL causes of action under the laws and
7 precedents of California.

8 5. The claim regarding the card agreement as a whole (excluding its arbitration provision)
9 centers on its inclusion of a variety of terms that are unconscionable and illegal under
10 controlling California and Ninth Circuit law as well as American Express' fraud in inducing
11 card holders to enter the agreement and make payment thereunder. Having paid a fee for that
12 agreement and the rights created thereby, Plaintiffs and similarly situated persons have received
13 something worth monetarily less than that for which they paid: they received only an
14 unconscionable and unenforceable agreement or terms rather than enforceable and conscionable
15 ones. That creates an "injury in fact" and a resulting "loss of money." On the one hand and
16 reflecting the misrepresentations made by American Express that are of a nature calculated to
17 induce the making of a contract and payment and display a lack of fair dealing, the inclusion of
18 those unconscionable or illegal terms gives rise to a non-statutory cause of action for fraud and
19 deceit that, due to the permeation of the unconscionable terms, requires non-statutory rescission
20 of the agreement as a whole and common law restitution of the fees paid. These unconscionable
21 terms include, in addition to the adhesive nature of the contract itself, such matters as American
22 Express' unilateral right to change any term of the agreement at its will and without any reason
23 (which is denied to the card holder), American Express' unilateral right to take any action
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1 without waiving its rights under the agreement which is denied to the card holder, and its
2 statement that the laws of Utah (in the case of the charge card and credit card) or New York (in
3 the case of the gift card and dining card) are the controlling laws.

4 On the other hand, the inclusion of those unconscionable and illegal terms in the
5 agreements (without consideration of any fraud in inducing the agreements) is an unlawful and
6 unfair practice, respectively, that has, is and continues to occur: (a) in violation of UCL on the
7 basis that the unconscionable terms are illegal and unfair; and, (b) in violation of the CLRA,
8 which makes insertion of an unconscionable provision in a contract an unlawful act. Similar to
9 the arbitration provision, the card holder simply gets less than that for which he paid due to the
10 inclusion of these unconscionable terms and conditions which, alone or in tandem, render the
11 agreement itself unconscionable and thereby suffers an “injury in fact” and a resulting loss of
12 money. With regard to the consumer statute causes of action, Plaintiffs, on behalf of themselves
13 and/or all other similarly situated consumers and residents, respectively, in California are
14 entitled to: (1) a Declaratory Judgment declaring the card agreement to be unconscionable,
15 illegal and unenforceable; (2) statutorily authorized injunctive and restitutionary relief
16 (including disgorgement of profits) as to the UCL causes of action; (3) statutorily authorized
17 injunctive and restitutionary relief, and punitive damages as to the CLRA causes of action; (4)
18 prejudgment interest; and, (5) attorney’s fees (including costs) specifically authorized by the
19 CLRA, and otherwise available in UCL causes of action under the laws and precedents of
20 California.
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II.

The Parties

6. Plaintiff David J. Lee (“Lee”) is an individual who, at all relevant times herein mentioned, resided in the City of Kentfield, Marin County, State of California and, hence, within the geographic boundaries of this District Court.

7. Plaintiff Daniel R. Lloyd (“Lloyd”) is an individual who, at all relevant times herein mentioned, resided in the City of Paso Robles, San Luis Obispo County, State of California.

8. Plaintiffs respectively bring this as a class action composed of all similarly situated consumers (as to the CLRA causes of action) and “persons” (as to all other causes of action) residing in the State of California more fully described in paragraph 140 below.

9. Defendant American Express Travel Related Services Company, Inc. (“Card”) is a New York corporation whose principle place of business is located in the State of New York.² It is a wholly owned subsidiary of the American Express Company and is the parent company of American Express Centurion Bank and American Express Bank, FSB, respectively. During some or all of the periods mentioned herein, it has been or is, among other things, in the business of opening American Express charge card accounts with individuals and/or business entities for which an annual fee is paid. It also issues and receives payment for American Express gift cards and dining cards. Card is authorized to conduct business within the State of California.

10. Defendant American Express Centurion Bank (“Centurion Bank”) is a Utah corporation, having it only two offices located in Utah (with no offices located in any other State). It is a wholly owned subsidiary of Card and is, among other things, in the business of issuing

² Unless otherwise specified, all Defendants are referred to collectively as “American Express.”

1 American Express charge cards and credit cards to persons and/or business entities. As relevant
2 here, at the present time it issues the following American Express charge cards for which an
3 annual fee is paid: American Express Preferred Rewards Green Card, American Express
4 Preferred Rewards Gold Card, American Express Rewards Plus Gold Card, American Express
5 Platinum Card, and the American Express Centurion [Black] card. It is not authorized to
6 conduct business within the State of California.

7 11. Defendant American Express Bank, FSB (“FSB”), is a wholly owned subsidiary of
8 Centurion Bank and is a “d.b.a” for Centurion Bank. Its headquarter is located in New York
9 City, New York. It is also a wholly owned subsidiary of Card pursuant to the Supplemental
10 Servicing Agreement of June 30, 2004 between, among other American Express-related entities,
11 Card and Centurion Bank. At the close of business on April 16, 2004, Centurion Bank sold a
12 portion of its charge and credit card account portfolio to FSB. As relevant here and without
13 limitation, at the present time it issues the following American Express credit cards for which an
14 annual fee is paid: Delta Sky Miles card, Gold Delta Sky Miles card, Platinum Delta Sky Mile
15 card, Skypoint Credit Card of Delta and American Express, Jetblue Card from American
16 Express, One from American Express card, and Starwood Preferred Credit Card from American
17 Express. FSB also issues the following American Express charge cards to persons and/or
18 business entities for which an annual fee is charged: Business Gold Rewards Card, Business
19 Platinum Card, American Express Corporate Card, American Express Business ExtrAA
20 Corporate Card, Corporate Platinum Card, and Executive Corporate Card. Plaintiffs are
21 informed and believe, and on that basis allege, that FSB is not authorized to do business in
22 California.
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12. The true names and capacities of the defendants sued herein as Does 1 through 100 are unknown to Plaintiff who therefore sues them by such fictitious names. Plaintiff will amend this complaint to allege the true names and capacities of these defendants when they have been determined. Each of the fictitiously named defendants is responsible in some manner for the acts alleged herein.

13. At all times mentioned in the causes of action alleged herein, each and every defendant was an agent and/or employee of each and every other defendant. In doing the things alleged in the causes of action stated herein, each and every defendant was acting within the course and scope of this agency or employment and was acting with the consent, permission and authorization of each of the remaining defendants. All actions of each defendant as alleged in the causes of action stated herein were ratified and approved by every other defendant or their officers or managing agents, and by agreeing to actively conceal the true facts regarding the acts and omissions, as alleged herein, engaged in conspiratorial conduct with each other.

III.

Jurisdiction and Venue

14. Since Plaintiffs on their own behalf and on behalf of similarly situated consumers and residents of California, respectively, are requesting restitutionary relief, statutory restitutionary relief (including disgorgement of profits), punitive damages, and prejudgment interest totaling an amount in excess of \$5,000,000.00, jurisdiction arises under 28 U.S.C. § 1332 (diversity).

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because: the products at issue are advertised, promoted, sold and used in the geographic parameters of the United States District for the Northern District of California; Defendants have received substantial compensation from the sale of the products at issue in this District by engaging in acts and

practices that constitute unfair competition and violation of law within this District and which had an effect in this District; and, Plaintiff Lee is a resident of this District.

IV.

The Facts

A. The Facts Concerning American Express Cards: Charge, Credit, And Gift

16. As relevant here, American Express issues four different kinds of cards:

(a) charge cards for which an annual fee is paid by the card holder, that require all charges to the card be due and payable when the monthly billing statement is received, and that has no credit or revolving credit feature (a fee may be charged for late payments, usually \$35 or 2.99% of the unpaid monthly balance depending upon State law);

(b) credit cards upon which an annual fee is charged but which are revolving credit instruments that do not need to be paid off in full at the end of the monthly billing cycle, upon which no late fee is charged as long as the minimum payment is timely made but which charges a late fee when payment is untimely, and which carries a balance forward as a loan charging interest;

(c) gift cards which are a prepaid payment device that comes with a set dollar value printed on the front of the gift card, and which is not a credit card, charge card or debit card; and,

(d) “Be My Guest Dining Cards which are a prepaid payment device that comes with a set dollar value printed on the front of the card, and which is not a credit card, charge card or debit card.

A true and correct copy of the official American Express Internet website page listing the various “personal” “charge” and “credit” cards, respectively, issued by American Express

(which can be found at http://www201.americanexpress.com/apply/Fmacfservlet?csi=0/0/b/12&us_nu=dd) is Exhibit 1 hereto and incorporated herein by reference. Charge cards and credit cards are necessities in today's world: they are required to rent a car, reserve an airline ticket, stay at a hotel, make a purchase on the Internet, or cash a third-party check at many banks.

17. American Express charge cards, credit cards, gift cards, and dining cards, respectively, are means of and used to obtain goods and/or services (including services furnished in connection with the sale or repair of goods) from any person or business who accepts the respective card in payment for the goods or services provided. So-called "business" cards may be and are used to this end.

18. The American Express charge card does not involve "credit" and the purchase of a cardmembership purchases and provides only a "convenience service" for the card holder. The charge card has distinct advantages over cash, checks, and other means of payment: the convenience use it provides minimizes the need to carry cash, allows the card holder to defer payment for a short time (until receipt of the monthly billing statement), and establishes a favorable payment record that is important in financial evaluations.

19. The purchase of a cardmembership (for which a fee is paid) relative to a credit card purchases and provides, at least in great part, a "convenience service" even when "credit" can be implicated if the monthly balance is not paid in full upon receipt of the monthly billing statement. It provides a means of payment which leaves the option open to the card holder to either pay his/her monthly statement in full upon its receipt (and thus not incur any interest indebtedness or otherwise use the "credit" service of the card) or to not pay the bill in full and use the revolving credit feature. Regardless of which option is chosen by the card holder, the

1 use of the credit card has distinct advantages over cash, checks, and other means of payment:
2 i.e., the credit card not only minimizes the need to carry cash and allows the user to defer
3 payment and establish a favorable credit history but also, importantly, increases the card
4 holder's ability to purchase goods and services and in so doing avoid the red tape involved in
5 obtaining a personal loan. Plaintiffs are informed and believe, and on that basis allege, that
6 some holders of credit cards do, from time to time or all of the time, pay the monthly balance in
7 full upon receipt of the monthly billing statement and do not avail themselves of the credit
8 feature of the card.

9 20. Plaintiffs are informed and believe, and on that basis allege, that American Express
10 maintains records identifying – for at least the last four years preceding the filing of this
11 Complaint -- each holder of a specific credit card, charge card, gift card or dining card and their
12 current/last known address, the amount of fees paid by him/her, the date(s) upon which a card
13 was issued to that person, the charges made by that person on his American Express card, and
14 other means by which each card holder (including persons purchasing Gift Cards and Dining
15 Cards) may be identified.
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17 21. The purchase of an American Express Gift Card purchases and provides a convenience
18 service since it can be used at retailers, restaurants, amusement parks, sporting events, movie
19 and other theaters, spas, salons and certain other merchants that are located in the United States
20 and that accept the American Express Card, including mail order, online and brick and mortar
21 establishments. It cannot be used at car rentals, cruise lines, for recurring billing purchasers, or
22 at casinos or ATMs. The purchase of an American Express Dining Card purchases and provides
23 a convenience service as well since it can be used not only for dining at restaurants but,
24 according to the official American Express website, can now be used for the same purposes as a
25

1 Gift card. Both the Dining Card and the Gift Card have distinct advantages over cash, checks,
2 and other means of payment: the convenience use it provides minimizes the need to carry cash
3 or checks or in any way incur indebtedness of any type (including credit).

4 22. The first American Express travel charge card was introduced on or about October 1,
5 1958. In 1966 American Express introduced the Gold Card and in 1984 the Platinum Card,
6 both of which were charge cards. In 1987, American Express introduced the Optima card, its
7 first revolving credit credit card product, which was followed in 1999 by the Blue credit card.
8 During the period from 1987 to the present, American Express has introduced a number of
9 credit cards (requiring payment of an annual fee but also involving revolving credit) that were
10 co-branded with various business entities such as Delta Airlines, Jetblue Airlines, and Starwood
11 Hotels.

12 23. Upon information and belief, Plaintiffs allege that American Express has currently
13 approximately 40,000,000 charge card and credit card accounts in the United States,
14 approximately and at least ten (10) per cent of which are issued to California consumers and/or
15 residents, respectively. Upon information and belief, Plaintiffs further allege that American
16 Express receives a “merchant fee” for each charge made on the card, payable by the merchant
17 based on a percentage of the sales price.

18 24. During some or all of the four years preceding the filing of the Complaint and three
19 years preceding the filing of the Complaint, respectively, American Express issued “personal”
20 charge cards at the following annual fees:
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- 22 (a) The American Express Card (Green) -- \$95.00 annual fee, \$30.00 annual fee
23 each for up to 5 additional cards. A true and correct copy of the American
24 Express Internet website page containing the “Terms and Conditions” obtaining to
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1 this charge card which can be found at
2 <https://www201.americanexpress.com/cards/Applyfservlet?csi=70/0/b/10/undefined/undefined/undefined/undefined&mgmID=undefined> is Exhibit 2 hereto and is
3 incorporated herein by reference;
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5 (b) American Express Gold Card -- \$125.00 annual fee, \$35.00 annual fee each
6 for additional cards. A true and correct copy of the American Express Internet
7 website page containing the "Terms and Conditions" obtaining to this charge card
8 which can be found at
9 <https://www201.americanexpress.com/cards/Applyfservlet?csi=76/0/b/10/undefined/undefined/undefined/undefined&mgmID=undefined> is Exhibit 3 hereto and is
10 incorporated herein by reference;
11

12 (c) American Express Rewards Plus Gold Card -- \$150.00 annual fee. A true and
13 correct copy of the American Express Internet website page containing the
14 "Terms and Conditions" obtaining to this charge card which can be found at
15 <https://www201.americanexpress.com/cards/Applyfservlet?csi=13/0/b/10/undefined/undefined/undefined/undefined&mgmID=undefined> is Exhibit 4 hereto and is
16 incorporated herein by reference;
17

18 (d) American Express Platinum Card -- \$450.00 annual fee, \$175.00 annual fee
19 each for additional 3 cards, \$45 annual fee for each additional card. A true and
20 correct copy of the American Express Internet website page containing the
21 "Terms and Conditions" obtaining to this charge card which can be found at
22 <https://www201.americanexpress.com/cards/Applyfservlet?csi=17/0/b/10/undefined/undefined/undefined/undefined&mgmID=undefined>
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ed/undefined/undefined/undefined&mgmID=undefined is Exhibit 5 hereto and is incorporated herein by reference;

(e) Fidelity American Express Platinum Card -- \$450.00 annual fee, \$175.00 annual fee each for additional 3 cards, \$45.00 annual fee for each additional card.

A true and correct copy of the American Express Internet website page containing the "Terms and Conditions" obtaining to this charge card which can be found at [https://www201.americanexpress.com/cards/Applyfservlet?csi=17/11516/b/10/0/0/0/n&from=2](https://www201.americanexpress.com/cards/Applyfservlet?csi=17/11516/b/10/0/0/n&from=2) is Exhibit 6 hereto and is incorporated herein by reference;

(f) Centurion Card (Black) -- \$5,000 initial issuance "relationship" fee, \$2,500 annual fee.

25. During some or all of the four years preceding the filing of the Complaint and three years preceding the following the filing of the Complaint, respectively, American Express issued "business" and "corporate" charge cards. A true and correct copy of the official American Express Internet website page listing the various "business" "charge" and "credit" cards, respectively, issued by American Express (which can be found at http://www201.americanexpress.com/sbsapp/FMACServlet?request_type=CompareAll&us_nu=dd) is Exhibit 7 hereto and incorporated herein by reference. These charge cards were issued with the following annual fees were charged:

(a) Business Gold Rewards Card -- \$125.00 annual fee, \$45.00 annual fee each for additional cards. A true and correct copy of the American Express Internet website page containing the "Terms and Conditions" obtaining to this charge card which can be found at https://www201.americanexpress.com/sbsapply/EACQServlet?request_type=appl

yNow&bos=b&ct=24&eep=16489&iep=38&openria=0 is Exhibit 8 hereto and is incorporated herein by reference;

(b) Business Platinum Card -- \$395.00 annual fee, \$200.00 annual fee per employee card, \$200.00 annual fee each for additional Executive Platinum card, \$35.00 annual fee for each additional gold card. A true and correct copy of the American Express Internet website page containing the “Terms and Conditions” obtaining to this charge card which can be found at https://www201.americanexpress.com/sbsapply/EACQServlet?request_type=applyNow&bos=b&ct=16&eep=16451&iep=38&openria=0 is Exhibit 9 hereto and is incorporated herein by reference; and,

(c) American Express Corporate Card, and American Express Business ExtrAA Corporate Card, Corporate Platinum Card, Executive Corporate Card – annual fee determined by contractual agreement based on, among other things, the level of expenses charged, the amount of gross sales of the business, the number of cards issued.

26. During some or all of the four years preceding the filing of the Complaint and three years preceding the following the filing of the Complaint, respectively, American Express issued the following “business” and “corporate” credit cards (in “partnership” with various non-American Express entities) for which the following annual fees were charged:

(a) Delta Sky Miles credit card -- \$55.00 annual fee. A true and correct copy of the official American Express Internet website page containing the “Terms and Conditions” obtaining to this credit card can be found at

1 <http://www.201.americanexpress.com/apply/Fmacfservlet?csi=5/15516/b/10/0/0/0/n&from=2> is Exhibit 10 hereto and is incorporated herein by reference;

2
3 (b) Gold Delta Sky Miles credit card -- \$85.00 annual fee (\$30.00 if the card
4 holder also holds another qualified American Express card). A true and correct
5 copy of the official American Express Internet website page containing the
6 “Terms and Conditions” obtaining to this credit card can be found at
7 <https://www201.americanexpress.com/cards/Applyfservlet?csi=24/24000/b/218/2510192095/250092909721/20/n&from=0&mgmID=undefined> is Exhibit 11
8 hereto and is incorporated herein by reference;

9
10 (c) Platinum Delta Sky Miles credit card -- \$135.00 annual fee (\$80.00 annual
11 fee if cardholder also holds another qualified American Express card). A true and
12 correct copy of the official American Express Internet website page containing
13 the “Terms and Conditions” obtaining to this credit card can be found at
14 <https://www201.americanexpress.com/cards/Applyfservlet?csi=36/24000/b/64/2510192095/250092909721/20/n&mgmID=undefined&from=0> is Exhibit 12 hereto
15 and is incorporated herein by reference;

16
17 (d) Skypoints credit card from Delta Airlines and American Express -- \$49.00
18 annual fee (no annual fee if the card holder holds another qualified American
19 Express card). A true and correct copy of the official American Express Internet
20 website page containing the “Terms and Conditions” obtaining to this credit card
21 can be found at
22 <https://www201.americanexpress.com/cards/Applyfservlet?csi=14/24000/b/10/25>
23
24
25

1 10192095/250092909721/20/n&from=0&mgmID=undefined is Exhibit 13 hereto
2 and is incorporated herein by reference;

3 (e) Jetblue Card from American Express -- \$40.00 annual fee. A true and
4 correct copy of the official American Express Internet website page containing
5 the "Terms and Conditions" obtaining to this credit card can be found at
6 <https://www201.americanexpress.com/cards/Applyfservlet?csi=82/24000/b/10/25>
7 10192095/250092909721/20/n&from=0&mgmID=undefined is Exhibit 14 hereto
8 and is incorporated herein by reference; and,

9 (f) Starwood Preferred Guest Credit Card from American Express -- \$30.00
10 annual fee. A true and correct copy of the official American Express Internet
11 website page containing the "Terms and Conditions" obtaining to this credit card
12 can be found at
13 <https://www201.americanexpress.com/cards/Applyfservlet?csi=6/24000/b/10/251>
14 0192095/250092909721/20/n&from=0&mgmID=undefined is Exhibit 15 hereto
15 and is incorporated herein by reference.
16

17 American Express also issued a personal credit card – One from American Express – which has
18 a \$35.00 annual fee (free the first year), a true and correct copy of the "Terms and Conditions"
19 obtaining to that card being Exhibit 16 hereto and is incorporated herein by reference.

20 27. American Express, through Card, issues the American Express Gift Card and the Dining
21 Card. The Gift Card costs \$3.95 (plus shipping and handling) and comes in denominations of
22 \$25.00, \$50.00, \$100.00, and \$200.00, and carries attendant fees (\$5.95 for replacement cards,
23 \$2.00 monthly service charge if any funds remain on card after one year of purchase date). A
24 true and correct copy of the official American Express Internet website page containing the
25

1 Terms and Conditions obtaining to the Gift Card can be found at
2 http://www10.americanexpress.com/sif/cda/page/0,1641,22147,00.asp?us_nu=leftnav is Exhibit
3 17 hereto and is incorporated herein by reference. Plaintiffs are informed and believe and on
4 that basis allege that at least 100,000 gift cards have been purchased in California. American
5 Express, through Card, also issues the American Express Dining Card at the cost of \$4.95 per
6 chard and it carries attendant fees as well. A true and correct copy of the official American
7 Express Internet website page containing the Terms and Conditions for the Dining Card may be
8 found at <http://www10.americanexpress.com/sif/cda/page/0,1641,8521,00.asp>, a true and correct
9 copy of which is Exhibit 18 hereto and is incorporated herein by reference. Plaintiffs are
10 informed and believe and on that basis allege that at least 100,000 dining cards have been
11 purchased in California.

12 **B. Plaintiffs' Facts**

13
14 28. Plaintiff Lee obtained a Starwood Preferred Guest Credit Card from American Express
15 in or about April, 2006 which was accompanied by a cardmember agreement, a true and correct
16 copy of which is Exhibit 19 hereto and which is incorporated herein by reference. No annual
17 fee was charged for the first year (as a result of his accepting an introductory offer). He
18 obtained the card for personal use to purchase, among other things, goods or services (including
19 services furnished in connection with the sale or repair of goods) for his personal or household
20 use.

21 29. By letter dated November 30, 2006 sent to Kenneth Chenault (President and CEO of
22 Card) which was identical to letters he to sent to Mr. Poulsen (President and CEO of Centurion
23 Bank) and Mr. Short (President and CEO of FSB), respectively (all of which were sent certified
24 mail, return receipt requested), Plaintiff Lee pointed out the unconscionability and illegality of
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1 the agreement relating to his Starwood credit card, particularly its arbitration provision, under
2 California law and requested that American Express “correct, repair, replace or otherwise
3 rectify the goods or services” caused by the violation of California Civil Code § 1770(a)(19)
4 which makes it illegal to “insert[] an unconscionable provision into a contract.” True and
5 correct copies of the certified letters to Mr. Chennault, Mr. Poulsen, and Mr. Short are Exhibits
6 20, 21 and 22 hereto, respectively, and are incorporated herein by reference.

7 30. While neither Mr. Poulsen nor Mr. Short responded to Plaintiff Lee’s letters, Mr.
8 Chennault did. By letter dated December 11, 2006 from Dina Colton, an assistant to Mr.
9 Chennault, American Express responded to Lee’s letters of November 30, 2006. American
10 Express rejected Lee’s request, stating only that “Although the credit card laws of California are
11 changing, American Express cards are governed by the laws of the State of Utah,” and,
12 resultantly, averring that the arbitration agreement and card agreement were both legal and
13 conscionable. A true and correct copy of that letter is Exhibit 23 hereto and is incorporated
14 herein by reference.
15

16 31. On November 2, 2005, the Motion to Compel Arbitration and Stay Action filed by
17 American Express in Berry v. American Express Publishing Co., et al, Case No. 05CC00049
18 (Orange County Superior Court), a case exclusively challenging the conscionability and legality
19 of the American Express arbitration provision as a violation of the CLRA for which only
20 injunctive relief was sought, was denied. A true and correct copy of the Notice of Ruling on
21 that Motion is Exhibit 24 hereto and is incorporated herein by reference. The basis for that
22 Ruling was the determination by the Superior Court (Hon. Kim Dunning) that the American
23 Express arbitration provision was unconscionable and that California law provided controlling
24 law. A true and correct copy of pages 1 through 21 of the Reporter’s Transcript of the November
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1 2, 2005 hearing and oral ruling of the Superior Court is Exhibit 25 hereto and is incorporated
2 herein by reference.

3 32. American Express did not appeal the November 2, 2005 ruling. Plaintiffs are advised
4 and believe, and thereon allege, that under California law the denial of a motion to compel
5 arbitration is an immediately appealable final order and, further, that the failure by American
6 Express to file an appeal of the November 2 Order rendered that Order final. See California
7 Code of Civil Procedure § 12194(a); Hobbs v. Bateman Eichler, Hill & Richards, 164
8 Cal.App.3d 174, 191, 210 Cal.Rptr. 387 (1985).

9 33. Plaintiffs are advised and believe, and thereon allege, that it has been, is and will
10 continue to be the practice of American Express to uniformly advise its card holders, directly or
11 by implication, that the card holder agreements are conscionable and legal, and governed by the
12 laws of the States of New York and Utah, respectively.

13 34. In or about May, 2007, after his receipt of American Express' December 11, 2006 letter
14 and in reliance thereon as well as in reliance on the misrepresentations made by American
15 Express, Plaintiff Lee paid the \$30.00 annual fee to American Express for his Starwood credit
16 card.

17 35. In or about June, 2007, Plaintiff Lee purchased an American Express Gift Card and an
18 American Express Dining Card, and paid the fee charged therefore (including shipping and
19 handling). He obtained these cards for his personal use and it will be used to purchase, among
20 other things, goods or services for his personal or household use. True and correct copies of the
21 sales receipts for these cards are Exhibits hereto as 26 and 27 and are incorporated herein by
22 reference. Accompanying these cards were cardholder agreements, true and correct copies of
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1 these agreements are attached hereto as Exhibits 28 and 29 and which is incorporated herein by
2 reference.

3 36. Plaintiff Lee purchased the gift card and the dining card after his receipt of American
4 Express' December 11, 2006 letter and in reliance thereon as well as in reliance on the
5 misrepresentations made by American Express specified in this Complaint.

6 37. Plaintiff Lee obtained an American Express "Green" charge card in or about June 2007
7 which was accompanied by a cardmember agreement identical (except for the title thereof) to
8 Exhibit 19 hereto. The first year annual fee for that card has been waived by American Express
9 but at the end of the first year, he will be obligated to pay the annual fee should he wish to
10 continue to receive the card's convenience services. He obtained the card for his personal use to
11 purchase, among other things, goods or services (including services furnished in connection
12 with the sale or repair of goods) for his personal or household use.

13 38. Plaintiff Lee obtained the Green Card after his receipt of American Express' December
14 11, 2006 letter and in reliance thereon as well as in reliance on the misrepresentations made by
15 American Express.

16 39. Plaintiff Lloyd obtained an American Express Platinum charge card in 2003. He has
17 paid the annual fee in each of the years thereafter until the present time. He obtained the card
18 for his personal use to purchase, among other things, goods or services (including services
19 furnished in connection with the sale or repair of goods) for his personal or household use.
20 When he received the credit card from American Express it was accompanied by a cardmember
21 agreement, a true and correct copy of the version of the American Express cardmember
22 agreement supplied to card holders when Plaintiff Lloyd first obtained his charge card is Exhibit
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30 hereto and is incorporated herein by reference. That agreement contained an arbitration provision which specifically did not apply to California residents such as Plaintiff Lloyd.

40. After receiving his American Express Platinum charge card in 2003, Plaintiff Lloyd was advised by bill-stuffer letter in or about December 2003 that the cardmember agreement was being unilaterally modified by American Express and, as relevant here, that “Cardmembers having California billing addresses will no longer be excluded from the coverage of the section called Arbitration.” A true and correct copy of the type of form letter sent to California card holders such as Plaintiff is Exhibit 31 hereto and is incorporated herein by reference. Subsequent unilateral changes in the arbitration provision have been made by American Express and provided to Plaintiff by means of a “bill stuffer.” That agreement, including notably its arbitration provision, has from time-to-time been amended by American Express, which amendments were sent to Plaintiff(s) as “bill stuffers.”

41. In making the payments of the fees owed by him, Plaintiff Lloyd relied upon the statements and misrepresentations made by American Express as specifically set forth in this Complaint.

42. In accepting the contractual terms presented to them by American Express on a “take it or leave it” basis – which was effected by the use of the card rather than by formal written agreement or other writing – and paying their respective annual fees for the charge card and credit card as well as the purchase price of the Gift Card and Dining Card, respectively, Plaintiffs acted as reasonable consumers who were unwary and trusting of American Express.

43. In accepting the contractual terms presented to them by American Express on a “take it or leave it” basis, paying their respective annual fees for the charge card and credit card as well as the purchase price of the Gift Card and the Dining Card, respectively, Plaintiffs relied upon

1 the honesty of American Express that it would not insert illegal, unconscionable and/or
2 unenforceable terms and conditions in the arbitration provision of the agreement or other terms
3 of the agreement, respectively, since, among other things, they had no duty to and did not
4 suspect the dishonesty of American Express.

5 44. Plaintiffs, as reasonable consumers, were unaware of the illegality or unconscionability
6 of the arbitration provision or of the card agreement as a whole, respectively, at the times they
7 entered into their agreement with American Express and paid the fees requested from them.

8 45 Arbitration, pursuant to a contractual arbitration provision, is a speedy and inexpensive
9 means of dispute resolution in comparison to judicial proceedings that can, under a conscionable
10 and enforceable arbitration provision, be beneficial to card holders.

11 46. The arbitration provision is a material term of the American Express card agreement.

12 47. The ability of Plaintiffs to demand arbitration under an enforceable and legal arbitration
13 provision is an important and material factor relied upon by them in agreeing to enter into the
14 American Express agreements and to pay their fees.

15 48. Plaintiffs are advised and believe, and thereon allege, that the right to mandatory
16 arbitration has a pecuniary value that reflects, in whole or in part, the fees paid by them for their
17 cards and their respective use of their cards.

18 49. Plaintiffs are advised and believe, and thereon allege, that if the arbitration provision
19 contained in the agreement relating to their charge and credit cards is unconscionable, illegal
20 and unenforceable, Plaintiffs received something lower in value than that for which they paid
21 and, as a result, they have lost money as a result of the unconscionability, illegality, and
22 unenforceability of the American Express-imposed arbitration provision.
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1 50. Plaintiffs are advised and believe, and thereon allege, that the rights provided them by
2 the card agreement to American Express' charge cards, credit cards, gift cards and dining cards,
3 respectively, have a pecuniary value that reflects, in whole or in part, the fees paid by them for
4 their cards and their respective use of their cards.

5 51. Plaintiffs are advised and believe, and thereon allege, that if the cardmember agreement,
6 in whole or in part, is unconscionable, illegal and unenforceable, Plaintiffs received something
7 lower in value than that for which they paid and, as a result, they have lost money as a result of
8 the unconscionability, illegality, and unenforceability of the American Express-imposed card
9 agreement.

10 52. Plaintiff Lee is advised and believes, and thereon alleges, that the right to mandatory
11 arbitration contained in the Gift Card and Dining card agreement, respectively, has a pecuniary
12 value that reflects, in whole or in part, the fee paid by for his gift card and dining card,
13 respectively.

14 53. Plaintiff Lee is advised and believes, and thereon alleges, that if the arbitration provision
15 relative to the gift card and dining card is unconscionable, illegal and unenforceable, Plaintiff
16 received something lower in value than that for which he paid and, as a result, he has lost money
17 as a result of the unconscionability, illegality, and unenforceability of the American Express-
18 imposed arbitration provision.

19 54. In accepting the contractual terms presented to them by American Express on a "take it
20 or leave it" basis and paying their respective annual fees for the charge card and credit card as
21 well as the purchase price of the Gift Card and Dining Card, Plaintiffs contracted with American
22 Express in reliance with their reasonable belief that American Express would not commit an
23 illegal, unfair, or fraudulent act upon them in presenting them with a form agreement on a "take
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1 it or leave it” basis that contained an arbitration provision and other provisions, respectively,
2 that were and are illegal, unfair, unconscionable, and invalid.

3 55. Plaintiffs had no meaningful choice of reasonably available alternative sources for
4 charge cards, credit cards, Gift Cards or Dining Cards (similar to those sold by American
5 Express) free of the terms claimed to be illegal, unconscionable, invalid, and unenforceable:
6 American Express’ charge cards are “unique” in that no other issuer issues “charge” cards of the
7 type sold by American Express; American Express’ Gift Cards and Dining Cards, which have a
8 national application, are “unique” as well; and, seemingly all credit cards, gift cards, or “charge”
9 cards (assuming that any are issued by other than American Express) issued by American
10 Express and its competitors (including Capital One, Chase, Bank of America, HSBC) contain
11 the same or similar arbitration and other provisions challenged in this action.

12 56. Plaintiffs, on behalf of themselves and similarly situated persons, have a technically
13 arbitrable claim against American Express relating solely to the card agreement (without
14 reference to the arbitration provision contained in that provision): i.e., that they were induced to
15 enter into the agreement and paid the fees as a result of American Express’ fraud, deceit, and
16 misrepresentations.

17 57. Plaintiffs, on behalf of themselves and similarly situated persons, are and have been
18 willing to immediately invoke the American Express arbitration provision so that their fraud
19 claims against American Express would be decided in the arbitral context by an arbitrator if the
20 arbitration provision is conscionable, legal, and enforceable.

21 58. Plaintiffs are advised and believe, and thereon allege, that their claim of fraud against
22 American Express in the inducement of the card agreement (without reference to the arbitration
23 provision within that agreement) is an issue that should be decided by an arbitrator under an
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1 enforceable, valid, and conscionable arbitration provision, and that would be heard and decided
2 by an arbitrator if such a conscionable and enforceable arbitration provision existed here. See,
3 e.g., Nagrampa v. Mailcoups, Inc., 469 F.3d 1257 (9th Cir. 2006); Buckeye Check Cashing Inc.
4 v. Cardegna, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); Prima Paint Corp. v.
5 Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1987).

6 59. Plaintiffs are advised and believe, and thereon allege on behalf of themselves and
7 similarly situated persons, that their invoking the arbitration provision relative to their fraud
8 claims and seeking arbitration of that claim would be against public policy and would otherwise
9 be an illegal act by seeking to enforce an illegal and unconscionable arbitration provision.
10 Plaintiffs further are advised and believe, and thereon allege, on behalf of themselves and
11 similarly situated persons, that it would be futile to invoke arbitration under the unenforceable
12 arbitration provision and that doing so would be a waste of time and money. See Bertero v.
13 Superior Court, 216 Cal. App. 2d 213, 230 Cal. Rptr. 719 (1963) (parties improperly ordered to
14 arbitrate "would be put to the unnecessary delay and expense of an arbitration, further court
15 proceedings, and an appeal, after which they would be required to start over"), disapproved on
16 other grounds in St. Agnes Medical Center v. PacifiCare of California, 31 Cal.4th 1187, 1192, 8
17 Cal. Rptr. 3d 517, 82 P.3d 727 (2003).

18 60. Plaintiffs are advised and believe, and thereon allege on behalf of themselves and
19 similarly situated persons, that the exercise of their contractual right to demand mandatory
20 arbitration of their fraud claim against American Express would and/or could waive their right
21 and ability to challenge the unconscionability of the arbitration provision and/or the agreement
22 as a whole, respectively.
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61. The harm to Plaintiffs' interest, as well as of the interest of similarly situated persons, arising from the inability to enforce the arbitration provision in order to arbitrate their fraud and consumer statute claims (relating only to the agreement and not the arbitration provision) due to its/their unenforceability/unconscionability/illegality, is actual or imminent.

C. The American Express Card Agreements

62. Contained in the 2006 version of the standardized contractual agreement (which is presently used) entered into between Plaintiff Lee (and similarly situated persons he seeks to represent) and American Express relating to charge cards and credit cards is an Arbitration Provision that, in pertinent part, provides

“As used in this Arbitration Provision, the term ‘Claim’ means any claim, dispute or controversy between you and us arising from or relating to your Account, this Agreement ... and any other related or prior agreement that you may have had with us, or the relationships resulting from any of the above Agreements (‘Agreements’), except for the validity, enforceability or scope of this Arbitration Provision or the Agreements. For purposes of this Arbitration Provision, ‘you’ and ‘us’ also includes any corporate parent, or wholly or majority owned subsidiaries, affiliates, any licensees, predecessors, successors, assigns, any purchase of any accounts, all agents, employees, directors and representatives of any of the foregoing, and other persons referred to below in the definition of ‘Claims.’ ‘Claim’ includes claims of every kind and nature, including but not limited to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, fraud and other intentional torts, statutes, regulations, common law and equity. ‘Claim’ also includes claims by or against any third party using or providing any product, service or benefit in connection with any account ... The term ‘Claim’ is to be given the broadest possible meaning that will be enforced and includes, by way of example and without limitation, any claim, dispute or controversy that arises from or relates to (a) any of the accounts created under any of the Agreements, or any balances on any such accounts, (b) advertisements, promotions or oral or written statements related to any such accounts, goods or services financed under any of the accounts or the terms of financing, (c) the benefits and services relation to Cardmembership (including fee-based or free benefit programs, enrollment services and rewards programs), and (d) your application for any account. We shall not elect to use arbitration under the Arbitration Provision for any Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is individual and pending only in that court. ...

1 *Initiation of Arbitration Proceeding/Selection of Administrator.* Any claim shall
 2 be resolved, upon the election of you or us, by arbitration pursuant to this
 3 Arbitration Provision and the code of procedures of the national arbitration
 4 organizations to which the Claim is referred in effect at the time the claim is filed,
 except to the extent the Code conflicts with this Agreement. Claims shall be
 referred to either the National Arbitration Forum (NAF) or the American
 Arbitration Association (AAA)

5 Significance of Arbitration. IF ARBITRATION IS CHOSEN BY ANY PARTY
 6 WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE
 7 RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY
 8 TRIAL ON THAT CLAIM. FURTHER, YOU AND WE WILL NOT HAVE
 9 THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR
 10 AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY
 CLAIM SUBJECT TO ARBITRATION. EXCEPT AS SET FORTH BELOW,
 THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE
 THAT OTHER RIGHTS THAT YOU OR WE WOULD HAVE IF WE WENT
 TO COURT ALSO MAY NOT BE AVAILABLE IN ARBITRATION.

11 *Restrictions on Arbitration.* If either party elects to resolve a Claim by
 12 arbitration, that Claim shall be arbitrated on an individual basis. *There shall be no*
 13 *right or authority for any Claims to be arbitrated on a class action basis or on*
 14 *bases involving Claims brought in a purported representative capacity on behalf*
 15 *of the general public, other Cardmembers or other persons similarly situated.*
 16 The arbitrator's authority to resolve Claims is limited to Claims between you and
 17 us alone, and the arbitrator's authority to make awards is limited to awards to you
 18 and us alone. Furthermore, Claims brought by you against us, or by us against
 19 you, may not be joined or consolidated in arbitration with Claims brought by or
 20 against someone other than you, unless agreed to in writing by all parties. No
 arbitrator's award or decision will have any preclusive effect as to issues or claims
 in any dispute with anyone who is not a named party to the arbitration.
 Notwithstanding any other provision in the Agreement (including but not limited
 to the 'Continuation' provision below and without waiving either party's right to
 appeal such decision, should any portion of the "*Restrictions on Arbitration*"
 provision be deemed invalid or unenforceable, then the entire Arbitration
 Provision (with the exception of this sentence) will not apply. ... " (Italics and
 capitalization in original)

21 Exhibit 19.

22 63. The arbitration provision in effect in 2003-05 relative to Plaintiff Lloyd (and those card
 23 holders whom he seeks to represent) was similar, albeit not identical, except in the following
 24 regards:
 25

(a) The first sentence provided:

“As used in this Arbitration Provision, the term ‘Claim’ means any claim, dispute or controversy between you and us arising from or relating to your Account; this Agreement ... and any other related or prior agreement that you may have had with us, or the relationships resulting from any of the above Agreements (‘Agreements’), including the validity, enforceability or scope of this Arbitration Provision or the Agreements.” (Emphasis added denoting change in language from the 2006 provision).

(b) The ultimate sentence of the “Restrictions on Arbitration” quoted above did not exist and the term provided:

“If any portion of this Arbitration Provision is deemed invalid or unenforceable under any principle or provision of law or equity, it shall not invalidate the remaining portions of this Arbitration Provision or the Agreement, each of which shall be enforceable regardless of such invalidity.”

Ex. 30.

64. The arbitration provision pertaining to the Gift card and dining card mirror, in great part, the charge/credit card agreement arbitration provision with the exception of the description of “you” designated the card purchaser and the person to whom the card was given. See and compare Ex. 17, 18, 28, 29 and 19. Additionally, the Gift Card and Dining Card agreement’s definition of “Claims” contains the pre-2005 amendment and provides:

“As used in this Arbitration Provision, the term ‘Claim’ means any claim, dispute or controversy between you and us arising from or relating to your Account; this Agreement ... and any other related or prior agreement that you may have had with us, or the relationships resulting from any of the above Agreements (‘Agreements’), including the validity, enforceability or scope of this Arbitration Provision or the Agreements.” (Emphasis added)

ibid. A difference does exist between the two since the Dining Card’s provision does not contain the “continuation” restriction set forth in paragraph 62 above. Exhibit 19.

65. The relevant provisions of the cardmember agreement (excepting the arbitration provision) include:

“Changing this Agreement/Assignment of this Agreement. We may change the terms or add new terms to this Agreement at any time, in accordance with applicable law. We may apply any changed or new terms to any then-existing balances on your Account as well as to future balances.”

“Our failure to exercise any of our rights under this Agreement, our delay in enforcing any of our rights, or our waiver of our rights on any occasion, shall not constitute a waiver of such rights on any other occasion.”

“Applicable Law

This Agreement and your Account [or, relative to the Gift Card and the Dining Card, ‘These terms and conditions and your ... Card] and all questions about their legality, enforceability and interpretation, are governed by the laws of the State of Utah [or, relative to the Gift Card and Dining Card, “the State of New York USA] (without regard to internal principles of conflicts and laws), and by applicable federal law [the last phrase being omitted from the Gift Card and Dining Card agreement].”

Ex. 17, 18, 19, 28, 29, 30.

VI.
Causes of Action

First Cause of Action
(Arbitration Provision --Violation of Bus. & Prof. Code 17200 et seq. Due To
Illegal Practice Under Civil Code § 1670.5
And The Common Law)

66. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1-4, 6-50, and 52-64 as though fully set forth herein.

67. California Bus. & Prof. Code § 17200 provides, in relevant part:

“As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice...

68. California Bus. & Prof. Code § 17203 provides, in relevant part:

“Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments ... as may be necessary to prevent the use or

1 employment by any person of any practice which constitutes unfair competition
2 or as may be necessary to restore to any person in interest any money or
3 property, real or personal, which may have been acquired by means of such unfair
4 competition. Any person may pursue representative claims or relief on behalf of
5 others only if the claimant meets the standing requirements of Section 17204 [that
6 he “has suffered injury in fact and has lost money or property as a result of such
7 unfair competition”]”

8 69. California Code of Civil Procedure § 382 provides, in relevant part:

9 “... when the question is of a common or general interest, of many persons, or
10 when the parties are numerous, and it is impracticable to bring them all before the
11 court, one or more may sue or defend for the benefit of all.”

12 70. California Civil Code § 1670.5 is the codification of the common law relating to
13 unconscionability of contracts and/or contractual provisions and provides, in relevant part:

14 “(a) If the court as a matter of law finds the contract or any clause of the
15 contract to have been unconscionable at the time it was made the court may refuse
16 to enforce the contract, or it may enforce the remainder of the contract without the
17 unconscionable clause, or it may so limit the application of any unconscionable
18 clause as to avoid any unconscionable result.”

19 71. The arbitration clause, which was inserted into the contract between American Express
20 and Plaintiffs (and other similarly situated persons), is unconscionable, illegal and thereby
21 violates California Civil Code § 1670.5 and the common law relating to unconscionability of
22 contracts and contractual provision in that, among other reasons, it
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1 (a) was imposed on all card holders on a “take it or leave it” basis with no
2 opportunity by the card holder to negotiate any term thereof (see Discover Bank
3 v. Superior Court, 36 Cal.App.4th 148, 159-160, 40 Cal.Rptr.3d 76 (2005);
4 Armanderiz v. Foundation Health Psychcare Services, Inc., 24 Cal.4th 83, 113-
5 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000); Shroyer v. New Cingular Wireless
6 Services, Inc., 2007 U.S.App.LEXIS 19560 (9th Cir. 2007));

7 (b) was contained in an adhesive form agreement prepared by American
8 Express and concerning which American Express was in a much stronger
9 bargaining position than the card holder (ibid.; Gentry v. Superior Court, 2007
10 Cal.LEXIS 9376 (2007);

11 (c) provides that all claims “shall be arbitrated on an individual basis” and
12 that no claim “may be arbitrated on a class action basis or on bases involving
13 Claims brought in a purported representative capacity on behalf of the general
14 public, other Cardmembers [or “gift cardholders” or “dining card holders”] or
15 other persons similarly situated” in a situation, as here, involving a class action
16 waiver in the context where predictably only “small” amounts of money are
17 involved (the annual fee or gift/dining card fee) and as part of a scheme to
18 deliberately cheat large numbers of its card holders out of the individually “small”
19 amounts represented by the fees paid for the card and the diminution in value of
20 that which Plaintiffs and similarly situated card holders received (Gentry v.
21 Superior Court, supra; Discover Bank, supra; Schroyer, supra (adopting Discover
22 Bank); Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003); Ingle v. Circuit City
23 Stores, Inc., 328 F.3d 1165, 1176 (9th Cir. 2003));

1 (d). provided, until 2005, relative to credit cards and charge cards that an
2 arbitration is mandated of “any claim, dispute, or controversy arising from or
3 relating to your Account; this Agreement ... and any other related or prior
4 agreement that you may have had with us, or the relationships resulting from any
5 of the above Agreements (‘Agreements’), including the validity, enforceability or
6 scope of this Arbitration Provision or the Agreements” and thus infringes on the
7 sole authority of the courts to consider claims that an arbitration provision is
8 unconscionable (Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395,
9 405-404, 87 S.Ct. 1801, 103 L.Ed.2d 1038 (1967); Flores v. TransAmerica Home
10 First, Inc., Cal.App.4th 846, 113 Cal.Rptr.2d 376 (2001); and Stirlin v. Supercuts,
11 Inc., 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138 (1997);

12 (e) provides with regard to the gift card and dining card, respectively, that an
13 arbitration is mandated of “any claim, dispute, or controversy arising from or
14 relating to your Account; this Agreement ... and any other related or prior
15 agreement that you may have had with us, or the relationships resulting from any
16 of the above Agreements (‘Agreements’), including the validity, enforceability or
17 scope of this Arbitration Provision or the Agreements” in direct contravention of
18 Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S.Ct. 1204, 163
19 L.Ed.2d 1038 (2006), and Nagrampa v. Mailcoups, Inc., 469 F.3d 1257 (9th Cir.
20 2006);

21 (f) provides that “claims brought by you against us, or by us against you, may
22 not be joined or consolidated in arbitration with Claims brought by or against
23 someone other than you” in a context where, as here, predictably only “small”
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1 amounts of money (the fees) are involved and as part of a scheme to deliberately
2 cheat large numbers of its card holders out of the individually “small” amounts
3 represented by the fees paid for the card (Discover Bank v. Superior Court, *supra*,
4 36 Cal.App.4th at 153; Szetla v. Discover Bank, 97 Cal.App.4th 1094, 118
5 Cal.Rptr. 862 (2002); Comb v. PayPal, Inc., 218 F.Supp.2d 1165, 175 (N.D.Cal.
6 2002));

7 (g) provides a description of the term “us” relating to the non-card holder
8 parties by whom or against whom a claim can be made that must be arbitrated is
9 so vague and overbroad that it is patently insufficient to establish any reasonable
10 expectation or knowledge of the cardholder as to what matters and persons are
11 covered by the agreement;

12 (h) provides that no injunctive relief may ever been given in that relief under
13 the agreement can be made only on “an individual basis” not involving “the
14 general public” since the decision maker’s “authority is limited to claims between
15 you and us [Defendants and amorphous others] alone” in which relief “is limited
16 to awards to you and us alone.” even though statutory injunctive relief under
17 the UCL and CLRA are unwaivable (Broughton v. Cigna Healthplans, 21 Cal.4th
18 1066, 90 Cal.Rptr.2d 334, 988 P.2d 334 (1999); Cruz v. PacificCare Health
19 Systems, Inc., 30 Cal.4th 303, 133 Cal.Rptr.2d 58, 66 P.3d 1157 (2003); Davis v.
20 O’Melveny & Meyers, 485 F.3d 1066, 1080 (9th Cir. 2007); Nagrampa v.
21 Mailcoups, Inc., *supra*, 469 F.3d at 1289-1293;

22 (i) provides that all “claims of every kind and nature, including but not
23 limited to, initial claims, counterclaims, cross-claims and third-party claims and
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1 claims based upon contract, tort, fraud and other intentional torts, statutes,
2 regulations, common law and equity” must be arbitrated even though injunction
3 requests under the CLRA and UCL are never arbitrable ((Broughton v. Cigna
4 Healthplans, supra.; Cruz v. PacificCare Health Systems, Inc., supra.);

5 (j) provides that in arbitration “[a]ny Claim shall be resolved ... by
6 arbitration pursuant to this Arbitration Provision and the code of procedure of the
7 national arbitration organization to which the Claim is referred in effect at the
8 time the Claim is filed. Claims shall be referred to either the National Arbitration
9 Forum (‘NAF’) or the American Arbitration Association (‘AAA’)” [or JAMS
10 with regard to the dining card only] without providing the card holder with copies
11 of the rules of those organizations or specifying which of several code of
12 procedure applies to the arbitration (see Ultimo v. Harper, 113 Cal.App.4th 1402,
13 7 Cal.Rptr.2d 418 (2003); Fitz v. NCR Corp., 118 Cal.App.4th 702, 721, 13
14 Cal.Rptr.2d 88 (2004); Dunham v. Envtl. Chem. Corp. 2006 U.S.Dist.LEXIS
15 61068 (N.D.Cal. 2006));

16 (k) provides no alternative means by which some other arbiter or arbitral
17 organization may be chosen by the card holder;

18 (l) provides that “[t]he arbitration shall be governed by the applicable Code,
19 except that (to the extent enforceable under the FAA) this Arbitration Provision
20 shall control if it is inconsistent with the applicable Code” but fails to advise of
21 any specific inconsistency those codes may have with the Arbitration Provision
22 (ibid.) ;
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1 (m) provides no way for the card holder to know at the time he/she initially
2 agreed to arbitrate what the rules would be at the time of the arbitration as well as
3 what inconsistencies existed between the agreement and the Code because
4 American Express has given itself the unilateral right to amend the arbitration
5 provision at any time (including before, during, or after any arbitration) and the
6 arbitration provision otherwise makes the applicable arbitration rules those in
7 effect when the arbitration is filed (see Net Global Marketing, Inc. v. Dialtone,
8 Inc., 217 Fed.Appx. 598, 2007 U.S.App.LEXIS 674 (9th Cir. 2007); Ingle v.
9 Circuit City Stores, Inc., 328 F.3d at 1179; Geoffrey v. Washington Mutual Bank,
10 484 F.Supp.2d 1115, 1123 (S.D.Cal. 2007); Bragg v. Linder Research, Inc., 487
11 F.Supp.2d 593, 609 (E.D.Pa. 2007)(applying California law); Conglamur v.
12 Circuit City Stores, Inc., 2004 Cal.App.Unpub.LEXIS 8140 at *13-14 (2004));
13
14 (n) provides that “[n]o arbitrator’s award or decision will have any preclusive
15 effect as to issues or claims in any dispute with anyone who is not a named party
16 to the arbitration” which is against public policy by denying any mutual collateral
17 estoppel or precedential value to any decision rendered against American Express;
18
19 (o) provided, until 2005, that “[i]f any portion of this Arbitration Provision is
20 deemed invalid or unenforceable under any principle or provision of law or
21 equity, it shall not invalidate the remaining portions of this Arbitration Provision
22 or the Agreement, each of which shall be enforceable regardless of such
23 invalidity” even though all determinations as to severability of the provision is a
24 matter exclusively reserved for the Courts (see California Civil Code § 1670.5(a);
25 Armanderiz, supra, 24 Cal.4th at 1121-124; Stirlin, supra, Flores, supra)) ;

1 (p) provides since 2005 that “should any portion of the “Restrictions on
2 Arbitration’ [section containing the class action waiver, the injunction waiver, the
3 no consolidation of arbitral claims term] be deemed invalid or unenforceable, the
4 entire Arbitration Provision (other than this sentence) will not apply” even though
5 all determinations as to severability of the provision is a matter exclusively
6 reserved for the Courts (ibid.); and,

7 (q) provides only a vague and overbroad statement of what effect arbitration will
8 have on the legal rights of card holders.

9 72. Plaintiffs, as set forth below in paragraph 139-140 (the allegations of which are
10 incorporated herein by reference), bring this action on behalf of themselves and similarly
11 situated persons in 6 subclasses, all of which qualify for certification pursuant to California
12 Code of Civil Procedure § 382 on the grounds that:

13 (a) the classes as defined are ascertainable since membership therein is
14 defined by and limited to persons (either California consumers or residents of
15 California depending on whether the class is under the CLRA, the UCL, or the
16 fraud cause of action) having an American Express charge card, credit card, gift
17 card or dining card, respectively, for which a fee was paid during any part of the
18 period covering the limitations period and the time of final judgment under a card
19 agreement containing the same or similar arbitration provision or agreement
20 terms, respectively, as Plaintiffs (copies of which agreements and arbitration
21 provisions are referenced in the class definition). Those classes, each of which is
22 likely to contain at least hundreds of thousands of persons (either consumers or
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1 residents) are identifiable by American Express which keeps the records of all
2 such persons, including their last known billing addresses.

3 (b) there is a commonality of interests by and between Plaintiffs and the
4 members of the classes they seek to represent that is patent in that

5 (1) predominant common questions of law or fact are exclusively
6 involved: i.e., the unconscionability of terms in the arbitration
7 provision and card agreement, respectively, that are common to all of
8 the form provisions and agreements imposed by American Express on
9 a “take it or leave it” basis on the card holders; as to the fraud cause of
10 action, common representations and reliance on the misrepresentations
11 by Plaintiffs and class members exists;

12 (2) the Plaintiffs, as class representatives, are typical of the
13 classes and have only claims and defenses that are typical of those of
14 the respective classes in that, for instance, the claims for and quantum
15 of injunctive and restitutionary relief are identical for each member of
16 each class (i.e., the amount of the fee(s) paid by them) or easily subject
17 to proof without separate adjudications; and,

18 (3) Plaintiffs can and will adequately represent the interests of
19 the class since they are committed to maintaining the action and are
20 represented by counsel knowledgeable and experienced in consumer
21 and class action law.

22
23 (c) The issues which may be jointly tried (most of which are singularly ones
24 of law), when compared with the issues requiring separate adjudication, are so
25

1 numerous or substantial that the maintenance of a class action is advantageous to
 2 the judicial process and to the litigants.

3 **Second Cause of Action**
 4 **(Arbitration Provision --Violation of Bus. & Prof. Code 17200 et seq. Due To**
Illegal Practice Under Civil Code §§ 1668 and 3513

5 73. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1-4, 6-50,
 6 52-64, 66-72 as though fully set forth herein.

7 74. California Civil Code § 1668 provides, in relevant part,
 8 "All contracts which have for their object, directly or indirectly, to exempt anyone
 9 from responsibility for his own fraud, or willful injury to the person or property of
 10 another, or violation of law, whether willful or negligent, are against the policy of
 11 the law."

12 75. California Civil Code § 3513 provides, in relevant part,
 13 "Any one may waive the advantage of a law intended solely for his benefit. But a
 14 law established for a public reason cannot be contravened by a private agreement.
 15

16 76. The American Express arbitration provision violates Civil Code §§ 1668 and 3513,
 17 respectively, including, but not limited to, its provisions that no class or representative action
 18 can be maintained, and no injunctive relief may be given to any card holder. See, e.g., Stroyer
 19 v. New Cingular Wireless Services, Inc., supra, 2007 U.S.App.LEXIS 1560 at * 30; Discover
 20 Bank v. Superior Court, supra, 36 Cal.4th at 160-163, 165.

21 **Third Cause of Action**
 22 **(Arbitration Provision --Violation of Bus. & Prof. Code 17200 et seq. Due To**
 23 **Unfair Practice**

24 77. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1-4, 6-50,
 25 52-64, 66-76 as though fully set forth herein.

78. American Express' arbitration provision, due to its unconscionability and illegality, is an unfair practice that either "offends an established public policy [as represented by Civil Code §§ 1670.5, 1668 and/or 3513] or ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," [Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal.App.4th 700, 718-719, 113 Cal.Rptr.2d 399 (2001)], or which violates public policy tethered to specific constitutional, statutory or regulatory provisions such as Sections 1670.5, 1668, and/or 3513. Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 187, 83 Cal.Rptr.2d 548, 973 P.2d 527.

79. An unconscionable contract or contract provision or term is, as a matter of law, an unfair practice under the UCL. See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., *supra*, 20 Cal.4th at 183; People v. McKale, 25 Cal.3d 626, 683-84 (1979); Smith v. State Farm Mutual Automobile Ins. Co., *supra*, 93 Cal.App.4th at 719; State Farm Fire & Casualty Co. v. Superior Court, 45 Cal.App.4th 1093, 1104, 53 Cal.Rptr.2d 229 (1996); Lyddon v. Rocha-Albertsen, 2006 U.S.Dist.LEXIS 78957 (E.D. Cal. 2006); Ting v. AT&T, 182 F.Supp.2d 902, 921-22, *aff'd* in part, *rev'd* on other grounds in part, 319 F.3d 1126, 1150 (9th Cir. 2003).

Fourth Cause of Action
(Arbitration Provision (Charge Cards Only) --Violation of CLRA, Civil Code § 1770(a)(19))

80. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1-4, 6-50, 52-64, and 66-72 as though fully set forth herein.

81. The American Express charge card for which an annual fee is paid is a good or service subject to the requirements of CLRA.

1 82. Plaintiff sent letters to Kenneth Chenault, Mr. Poulsen, and Mr. Short (President and
2 CEO of Card, Centurion Bank, and FSB respectively) (all of which were sent certified mail,
3 return receipt requested), Plaintiff Lee pointed out the unconscionability and illegality of the
4 agreement relating to his Gift Card and Dining Card purchase and Green Card card, particularly
5 its arbitration provision, under California law and requested that American Express “correct,
6 repair, replace or otherwise rectify the goods or services” caused by the violation of California
7 Civil Code § 1770(a)(19) which makes it illegal to “insert[] an unconscionable provision into a
8 contract.” True and correct copies of the letters to Mr. Chennault, Mr. Poulsen, and Mr. Short
9 are Exhibits 32, 33, and 34 hereto, respectively, and are incorporated herein by reference. True
10 and correct copies of the return receipt card for these letters to Mr. Chennault, Mr. Poulsen, and
11 Mr. Short are Exhibits 35, 36, and 37 respectively, and incorporated herein by reference. No
12 response was received by Plaintiff Lee to any of these letters. No return receipt was received for
13 Defendant American Express Travel Related Services Company, Inc., however they did respond
14 to Plaintiff Lee’s letter of
15

16 83. By letter dated June 28, 2007 sent to Kenneth Chenault, Mr. Poulsen, and Mr. Short,
17 respectively, (President and CEO of Card, Centurion Bank, and FSB, respectively) (all of which
18 were sent certified mail, return receipt requested), Plaintiff Lloyd pointed out the
19 unconscionability and illegality of the agreement relating to his Platinum American Express
20 charge card, particularly its arbitration provision, under California law and requested that
21 American Express “correct, repair, replace or otherwise rectify the goods or services” caused
22 by the violation of California Civil Code § 1770(a)(19) which makes it illegal to “insert[] an
23 unconscionable provision into a contract.” True and correct copies of the letter to Mr.
24 Chennault, Mr. Poulsen, and Mr. Short are Exhibits 38, 39, and 40, respectively, and are
25

1 incorporated herein by reference. Only two (2) return receipts – that to Mr. Chennault and
2 Poulsen – were received by Mr. Lloyd, a true and correct copies of which are attached as
3 Exhibits 41 and 42 hereto and incorporated herein by reference. No response to the letters sent
4 was received by Mr. Lloyd.

5 84. The actions of American Express in inserting the arbitration provision into the charge
6 card agreement common to Plaintiffs and similarly situated persons was done in violation of
7 Subdivision 19 of California Civil Code § 1770(a) which states that:

8 “(a) The following unfair methods of competition and unfair or deceptive acts
9 or practices undertaken by any person in a transaction intended to result or
10 which results in the sale or lease of goods or services to any consumer are
11 unlawful:

12 ... (19). Inserting an unconscionable provision in the contract.”
13

14 85. At all times hereinmentioned, American Express knew that one or more of the terms of
15 the arbitration provision and/or the arbitration provision itself was unconscionable and illegal
16 under California law. Notwithstanding that knowledge, American Express with oppression,
17 fraud or malice and/or in willful and conscious disregard of the laws of California and the legal
18 rights of Plaintiffs and similarly situated persons inserted and maintained those unconscionable
19 terms and/or arbitration provision in its charge card card agreements.

20 **Fifth Cause of Action**
21 **(Arbitration Provision (Credit Cards Only) --Violation of CLRA, Civil Code**
22 **§ 1770(a)(19)**

23 86. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1-4, 6-50,
24 52-64, 66-72 as though fully set forth herein.
25

1 87. The American Express credit card for which an annual fee is paid is a good or service
2 subject to the requirements of CLRA.

3 88. The actions of American Express in inserting the arbitration provision into the credit
4 card agreement common to Plaintiff Lee and similarly situated persons was done in violation of
5 Subdivision 19 of California Civil Code § 1770(a) which states that:

6 “(a) The following unfair methods of competition and unfair or deceptive acts
7 or practices undertaken by any person in a transaction intended to result or
8 which results in the sale or lease of goods or services to any consumer are
9 unlawful:

10 ... (19). Inserting an unconscionable provision in the contract.”

11 89. At all times hereinmentioned, American Express knew that one or more of the terms of
12 the arbitration provision and/or the arbitration provision itself was unconscionable and illegal
13 under California law. Notwithstanding that knowledge, American Express with oppression,
14 fraud or malice and/or in willful and conscious disregard of the laws of California and the legal
15 rights of Plaintiffs and similarly situated persons inserted and maintained those unconscionable
16 terms and/or arbitration provision in its credit card card agreements.
17

18 **Sixth Cause of Action**
19 **(Arbitration Provision (Gift Cards And Dining Cards Only) –**
20 **Violation of CLRA, Civil Code § 1770(a)(19)**

21 90. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1-4, 6-50,
22 52-64, 66-72, and 82-83 as though fully set forth herein.

23 91. The American Express gift card and dining card for which a purchase fee is paid is a
24 good or service subject to the requirements of CLRA.
25

92. The actions of American Express in inserting the arbitration provision into the gift card and dining card agreement, respectively, common to Plaintiff Lee and similarly situated persons was done in violation of Subdivision 19 of California Civil Code § 1770(a) which states that:

“(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

... (19). Inserting an unconscionable provision in the contract.”

93. At all times hereinmentioned, American Express knew that one or more of the terms of the arbitration provision and/or the arbitration provision itself was unconscionable and illegal under California law. Notwithstanding that knowledge, American Express with oppression, fraud or malice and/or in willful and conscious disregard of the laws of California and the legal rights of Plaintiffs and similarly situated persons inserted and maintained those unconscionable terms and/or arbitration provision in its Gift Card and Dining Card card agreements.

Seventh Cause of Action
(Arbitration Provision (Charge Card Only) --Violation of Bus. & Prof. Code
17200 et seq. Due To
Illegal Practice In Violation Of Civil Code § 1770 (a)(19)

94. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1-4, 6-50, 52-64, and 66-72, 80-83 as though fully set forth herein.

95. The actions of American Express in inserting the arbitration provision into the charge card agreement common to Plaintiffs and similarly situated persons was done in violation of Subdivision 19 of California Civil Code § 1770(a) which states that:

“(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or

1 which results in the sale or lease of goods or services to any consumer are
2 unlawful:

3 ... (19). Inserting an unconscionable provision in the contract.”

4 96. That is a violation of California Bus. & Prof. Code § 17200 as it is an act in violation of
5 the CLRA.

6 **Eighth Cause of Action**
7 **(Arbitration Provision (Credit Card Only) --Violation of Bus. & Prof. Code**
8 **17200 et seq. Due To**
9 **Illegal Practice In Violation Of Civil Code § 1770 (a)(19)**

10 97. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1-4, 6-50,
11 52-64, 66-72, 80, 81-83, 86 as though fully set forth herein.

12 98. The actions of American Express in inserting the arbitration provision into the credit
13 card card agreement common to Plaintiffs’ American Express credit card and those similarly
14 situated persons was done in violation of Subdivision 19 of California Civil Code § 1770(a)
15 which states that:

16 “(a) The following unfair methods of competition and unfair or deceptive acts
17 or practices undertaken by any person in a transaction intended to result or
18 which results in the sale or lease of goods or services to any consumer are
19 unlawful:

20 ... (19). Inserting an unconscionable provision in the contract.”

21 99. That is a violation of California Bus. & Prof. Code § 17203 as it is an act in violation of
22 the CLRA.

Ninth Cause of Action
(Arbitration Provision (Gift Card And Dining Card Only) –
Violation of Bus. & Prof. Code
17200 et seq. Due To
Illegal Practice In Violation Of Civil Code § 1770 (a)(19)

100. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1-4, 6-50, 52-64, 66-72, 82-83, 90, 91 as though fully set forth herein.

101. The actions of American Express in inserting the arbitration provision into the Gift Card card and Dining Card agreement, respectively, common to the Gift Card and Dining Card of Plaintiff Lee and similarly situated persons was done in violation of Subdivision 19 of California Civil Code § 1770(a) which states that:

“(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

... (19). Inserting an unconscionable provision in the contract.”

102. That is a violation of California Bus. & Prof. Code § 17203 as it is an act in violation of the CLRA.

Tenth Cause Of Action
(Card Agreement (All Cards) – Fraud And Deceit)

103. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1, 5, 6-16, 22-47, 50-51, 54-61, 65 as though fully set forth herein.

104. Beginning at least three years prior to the filing of this Complaint and continuing until the present time (and into the future unless enjoined), American Express made misrepresentations to Plaintiffs and similarly situated persons American Express card holders

1 that the terms contained in its card member agreement (excluding its arbitration provision) to its
2 charge cards, credit cards, Gift cards, and Dining Cards, and the card agreement itself was
3 conscionable, legal, and enforceable, and that the controlling law pertaining to those cards was
4 New York law (relative to the Gift Cards and the Dining Cards) and Utah law (relative to the
5 charge cards and credit cards). These representations were made not only in the card agreement
6 themselves but in direct communications between the card holder and American Express and on
7 the official American Express Internet website. Specifically, the terms of the card agreement
8 about which these misrepresentations were made are:

9 (1) “Changing this Agreement/Assignment of this Agreement. We may change
10 the terms or add new terms to this Agreement at any time, in accordance with
11 applicable law. We may apply any changed or new terms to any then-existing
12 balances on your Account as well as to future balances.”

13 (2) “Our failure to exercise any of our rights under this Agreement, our delay in
14 enforcing any of our rights, or our waiver of our rights on any occasion, shall not
15 constitute a waiver of such rights on any other occasion.”

16 (3) “Applicable Law

17 This Agreement and your Account [or, relative to the Gift Card and Dining Card,
18 ‘These terms and conditions and your ... Card and all questions about their
19 legality, enforceability and interpretation, are governed by the laws of the State of
20 Utah [or, relative to the Gift Card and Dining Card, “the State of New York USA]
21 (without regard to internal principles of conflicts and laws), and by applicable
22 federal law [the last phrase being omitted from the Gift Card and Dining Card
23 card agreement.”

1 Ex. 15, 23, 29. Other representations, common to any inquiries that were made to American
2 Express concerning the conscionability and legality of its card agreements (or the terms thereof,
3 excluding the arbitration provision) consonant with the practice of American Express, are of the
4 type made in the December 11, 2006 letter from Dina Colton to Plaintiff Lee.

5 105. These representations made by American Express were in fact false and made with the
6 intention to deceive and defraud the Plaintiffs and similarly situated persons to induce them to
7 act in reliance on these misrepresentations by agreeing to the terms of the agreement and paying
8 fees thereunder. The true facts are that the identified provisions and the agreement as a whole
9 are unconscionable and illegal under California law (including precedents of the Ninth Circuit
10 Court of Appeals and district courts interpreting and applying California law) on the basis that,
11 for instance, they

12 (a) were imposed on all card holders on a “take it or leave it” basis with no
13 opportunity by the card holder to negotiate any term thereof (see Discover Bank
14 v. Superior Court, (a) was imposed on all card holders on a “take it or leave it”
15 basis with no opportunity by the card holder to negotiate any term thereof (see
16 Discover Bank v. Superior Court, 36 Cal.App.4th 148, 159-160, 40 Cal.Rptr.3d 76
17 (2005); Armanderiz v. Foundation Health Psychcare Services, Inc., 24 Cal.4th 83,
18 113-114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000); Shroyer v. New Cingular
19 Wireless Services, Inc., 2007 U.S.App.LEXIS 19560 (9th Cir. 2007));

20 (b) were contained in an adhesive form agreement prepared by American
21 Express and concerning which American Express was in a much stronger
22 bargaining position than the card holder (Discover Bank v. Superior Court,
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1 supra, 36 Cal.App.4th at 159-160; Armanderiz v. Foundation Health Psychcare
2 Services, Inc., supra, 24 Cal.4th at 113-114; Shroyer v. New Cingular Wireless
3 Services, Inc., 2007 U.S.App.LEXIS 19560 ;

4 (c) provide American Express with a “right” to make any unilateral
5 modification, including adding new terms to the agreement but provide no such
6 right to the card holder, which makes that provision unconscionable and illegal
7 pursuant to Net Global Marketing, Inc. v. Dialtone, Inc., 217 Fed.Appx. 598,
8 2007 U.S.App.LEXIS 674 (9th Cir. 2007); Ingle v. Circuit City Stores, Inc., supra,
9 328 F.3d at 1179; Geoffrey v. Washington Mutual Bank, 484 F.Supp.2d 1115,
10 1123 (S.D.Cal. 2007); Bragg v. Linder Research, Inc., 487 F.Supp.2d 593, 609
11 (E.D.Pa. 2007)(applying California law); Gonglamur v. Circuit City Stores, Inc.,
12 2004 Cal.App.Unpub.LEXIS 8140 at *13-14 (2004).

13 (d) provide American Express, but not the cardholder, with the ability to take
14 any action without waiving any rights that it might have under the agreement or
15 under the law; and,

16 (e) American Express has been, since at least 2005 with the non-appealed
17 (and, hence, final) Order in Berry v. American Express Publishing Co., supra, on
18 notice not only that its arbitration provision is unconscionable and unenforceable
19 but, importantly, that in spite of its statements to the contrary, the agreement is
20 controlled by California law.

21
22 106. Plaintiffs and similarly situated persons, at the time these representations were made by
23 American Express and at the time Plaintiffs and similarly situated persons took the actions
24 herein alleged, were ignorant of the falsity of American Express’ representations and believed
25

1 them to be true. In reliance on these representations, Plaintiffs and similarly situated persons
2 were induced to and did enter into the card agreement with American Express.

3 107. The aforementioned conduct of American Express was an intentional misrepresentation,
4 deceit, or concealment of a material fact(s) known to American Express with the intention on
5 the part of American Express of thereby inducing Plaintiffs and similarly situated persons into
6 entering the card agreement and making payment of the fees thereunder. It was despicable
7 conduct that subjected the Plaintiffs and similarly situated persons to a cruel and unjust hardship
8 in conscious disregard of their rights, so as to justify an award of punitive damages.

9
10 **Eleventh Cause of Action**
(Card Agreement (Charge Cards Only) –
Violation of CLRA, Civil Code § 1770(a)(19)

11 108. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1, 5, 6-16,
12 22-47, 50-51, 54-61, 65, 82-83, 105 (a)-(e) as though fully set forth herein.

13 109. The American Express charge card for which an annual fee is paid is a good or service
14 subject to the requirements of CLRA.

15 110 The actions of American Express in inserting unconscionable terms into the charge card
16 card agreement (excepting the arbitration provision) common to Plaintiffs and similarly situated
17 persons was done in violation of Subdivision 19 of California Civil Code § 1770(a) which states
18 that:

19
20 “(a) The following unfair methods of competition and unfair or deceptive acts
21 or practices undertaken by any person in a transaction intended to result or
22 which results in the sale or lease of goods or services to any consumer are
23 unlawful:

24 ... (19). Inserting an unconscionable provision in the contract.”
25

111. At all times hereinmentioned, American Express knew that one or more of the terms of the charge card card agreement (excluding the arbitration provision) and/or the agreement itself was unconscionable and illegal under California law. Notwithstanding that knowledge, American Express with oppression, fraud or malice and/or in willful and conscious disregard of the laws of California and the legal rights of Plaintiffs and similarly situated persons inserted and maintained those unconscionable terms and/or arbitration provision in its charge card card agreements.

Twelfth Cause of Action
(Card Agreement (Credit Cards Only) --Violation of CLRA, Civil Code § 1770(a)(19))

112 Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1, 5, 6-16, 22-47, 50-51, 54-61, 65, 82-83, 105(a)(e) as though fully set forth herein.

113. The American Express credit card for which an annual fee is paid is a good or service subject to the requirements of CLRA.

114. The actions of American Express in inserting unconscionable provisions into the credit card agreement common to Plaintiff Lee and similarly situated persons was done in violation of Subdivision 19 of California Civil Code § 1770(a) which states that:

“(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

... (19). Inserting an unconscionable provision in the contract.”

115. At all times hereinmentioned, American Express knew that one or more of the terms of the credit card card agreement (excluding the arbitration provision) and/or agreement itself was

unconscionable and illegal under California law. Notwithstanding that knowledge, American Express with oppression, fraud or malice and/or in willful and conscious disregard of the laws of California and the legal rights of Plaintiffs and similarly situated persons inserted and maintained those unconscionable terms in its charge card card agreements.

Thirteenth Cause of Action
(Card Agreement (Gift Cards And Dining Cards Only) –
Violation of CLRA, Civil Code § 1770(a)(19)

116. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1, 5, 6-16, 22-47, 50-51, 54-61, 65, 82-83, 105(a)-(e) as though fully set forth herein.

117. The American Express gift card and dining card, respectively, for which a purchase fee is paid is a good or service subject to the requirements of CLRA.

118. The actions of American Express in inserting the unconscionable terms (excluding the arbitration provision) into the gift card and dining card card agreement, respectively, common to Plaintiff Lee and similarly situated persons was done in violation of Subdivision 19 of California Civil Code § 1770(a) which states that:

“(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

... (19). Inserting an unconscionable provision in the contract.”

119. At all times hereinmentioned, American Express knew that one or more of the terms of the gift card and dining card card agreement and/or agreement itself were unconscionable and illegal under California law. Notwithstanding that knowledge, American Express with oppression, fraud or malice and/or in willful and conscious disregard of the laws of California

and the legal rights of Plaintiffs and similarly situated persons inserted and maintained those unconscionable terms and/or agreement in its charge card card agreements.

Fourteenth Cause of Action
(Card Agreement (Charge Card Only) --Violation of Bus. & Prof. Code 17200 et seq.
Due To Illegal Practice Under Civil Code § 1670.5
And The Common Law)

120. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1, 5, 6-16, 22-47, 50-51, 54-61, 65, 82-83, 105(a)-(e) as though fully set forth herein.

121 Various of the card agreement terms (excepting the arbitration provision) and the agreement itself which was inserted into the contract between American Express and Plaintiffs (and other similarly situated persons), is unconscionable, illegal and thereby violates California Civil Code § 1670.5 and the common law relating to unconscionability of contracts and contractual provision in that, among other reasons, it

(a) were imposed on all card holders on a “take it or leave it” basis with no opportunity by the card holder to negotiate any term thereof (see Discover Bank v. Superior Court, (a) was imposed on all card holders on a “take it or leave it” basis with no opportunity by the card holder to negotiate any term thereof (see Discover Bank v. Superior Court, 36 Cal.App.4th 148, 159-160, 40 Cal.Rptr.3d 76 (2005); Armanderiz v. Foundation Health Psychcare Services, Inc., 24 Cal.4th 83, 113-114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000); Shroyer v. New Cingular Wireless Services, Inc., 2007 U.S.App.LEXIS 19560 (9th Cir. 2007));

(b) were contained in an adhesive form agreement prepared by American Express and concerning which American Express was in a much stronger bargaining position than the card holder (ibid.); Discover Bank v. Superior Court,

1 supra, 36 Cal.App.4th at 159-160; Armanderiz v. Foundation Health Psychcare
2 Services, Inc., supra, 24 Cal.4th at 113-114; Shroyer v. New Cingular Wireless
3 Services, Inc., 2007 U.S.App.LEXIS 19560 ;

4 (c) provide American Express with a “right” to make any unilateral
5 modification, including adding new terms to the agreement but provide no such
6 right to the card holder, which makes that provision unconscionable and illegal
7 pursuant to Net Global Marketing, Inc. v. Dialtone, Inc., 217 Fed.Appx. 598,
8 2007 U.S.App.LEXIS 674 (9th Cir. 2007); Ingle v. Circuit City Stores, Inc., supra,
9 328 F.3d at 1179; Geoffrey v. Washington Mutual Bank, 484 F.Supp.2d 1115,
10 1123 (S.D.Cal. 2007); Bragg v. Linder Research, Inc., 487 F.Supp.2d 593, 609
11 (E.D.Pa. 2007)(applying California law); Conglamur v. Circuit City Stores, Inc.,
12 2004 Cal.App.Unpub.LEXIS 8140 at *13-14 (2004).

13 (d) they provide American Express, but not the cardholder, with the ability to
14 take any action without waiving any rights that it might have under the agreement
15 or under the law; and,

16 (e) American Express has been, since at least 2005 with the non-appealed
17 (and, hence, final) Order in Berry v. American Express Publishing Co., supra, on
18 notice not only that its arbitration provision is unconscionable and unenforceable
19 but, importantly, that in spite of its statements to the contrary, the agreement is
20 controlled by California law.
21
22
23
24
25

Fifteenth Cause of Action
(Card Agreement (Credit Card Only) --Violation of Bus. & Prof. Code 17200 et seq.
Due To Illegal Practice Under Civil Code § 1670.5
And The Common Law)

122. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1, 5, 6-16, 22-47, 50-51, 54-61, 65, 82-83, 105(a)-(e), and 118 as though fully set forth herein.

123. Various of the credit card card agreement terms (excepting the arbitration provision) and the agreement itself which was inserted into the contract between American Express and Plaintiffs (and other similarly situated persons), is unconscionable, illegal and thereby violates California Civil Code § 1670.5 and the common law relating to unconscionability of contracts and contractual provision for the reasons enumerated in paragraph 118 above, all of which are incorporated herein by reference.

Sixteenth Cause of Action
(Card Agreement (Gift Card And Dining Card Only)
--Violation of Bus. & Prof. Code 17200 et seq.
Due To Illegal Practice Under Civil Code § 1670.5
And The Common Law)

124. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1, 5, 6-16, 22-47, 50-51, 54-61, 65, 82-83, 105(a)-(e), and 118 as though fully set forth herein.

125. Various of the Gift Card and Dining Card card agreement terms (excepting the arbitration provision) and the agreement itself which was inserted into the Gift Card and Dining Card contract, respectively, between American Express and Plaintiffs (and other similarly situated persons), is unconscionable, illegal and thereby violates California Civil Code § 1670.5 and the common law relating to unconscionability of contracts and contractual provision for the reasons specified in paragraph 118 above, all of which are incorporated herein by reference.

Seventeenth Cause of Action

**(Card Agreement (Charge Cards) --Violation of Bus. & Prof. Code 17200 et seq.
Due To Unfair Practice**

126. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1, 5, 6-16, 22-47, 50-51, 54-61, 65, 82-83, 105(a)-(e), and 118 as though fully set forth herein.

127. American Express' charge card agreement and/or its specified terms (excluding the arbitration provision), due to its unconscionability and illegality, is an unfair practice that either "offends an established public policy [as represented by Civil Code §§ 1670.5, 1668 and/or 3513] or ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," [Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal.App.4th 700, 718-719, 113 Cal.Rptr.2d 399 (2001)], or which violates public policy tethered to specific constitutional, statutory or regulatory provisions such as Sections 1670.5, 1668, and/or 3513. Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 187, 83 Cal.Rptr.2d 548, 973 P.2d 527.

128. An unconscionable contract or contract provision or term is, as a matter of law, an unfair practice under the UCL. See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, 20 Cal.4th at 183; People v. McKale, 25 Cal.3d 626, 683-84 (1979); Smith v. State Farm Mutual Automobile Ins Co., supra, 93 Cal.App.4th at 719; State Farm Fire & Casualty Co. v. Superior Court, 45 Cal.App.4th 1093, 1104, 53 Cal.Rptr.2d 229 (1996); Lyddon v. Rocha-Albertsen, 2006 U.S.Dist.LEXIS 78957 (E.D. Cal. 2006); Ting v. AT&T, 182 F.Supp.2d 902, 921-22, aff'd in part, rev'd on other grounds in part, 319 F.3d 1126, 1150 (9th Cir. 2003).

Eighteenth Cause of Action
(Card Agreement (Gift Cards and Dining Cards Only)
--Violation of Bus. & Prof. Code 17200 et seq.
Due To Unfair Practice

129. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1, 5, 6-16, 22-47, 50-51, 54-61, 65, 82-83, 105(a)-(e), and 118 as though fully set forth herein.

130. American Express' Gift Card and Dining Card card agreements, respectively, and/or their specified terms (excluding the arbitration provision), due to its unconscionability and illegality, is an unfair practice that either "offends an established public policy [as represented by Civil Code §§ 1670.5, 1668 and/or 3513] or ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," [Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal.App.4th 700, 718-719, 113 Cal.Rptr.2d 399 (2001)], or which violates public policy tethered to specific constitutional, statutory or regulatory provisions such as Sections 1670.5, 1668, and/or 3513. Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 187, 83 Cal.Rptr.2d 548, 973 P.2d 527.

131. An unconscionable contract or contract provision or term is, as a matter of law, an unfair practice under the UCL. See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, 20 Cal.4th at 183; People v. McKale, 25 Cal.3d 626, 683-84 (1979); Smith v. State Farm Mutual Automobile Ins Co., supra, 93 Cal.App.4th at 719; State Farm Fire & Casualty Co. v. Superior Court, 45 Cal.App.4th 1093, 1104, 53 Cal.Rptr.2d 229 (1996); Lyddon v. Rocha-Albertsen, 2006 U.S.Dist.LEXIS 78957 (E.D. Cal. 2006); Ting v. AT&T, 182 F.Supp.2d 902, 921-22, aff'd in part, rev'd on other grounds in part, 319 F.3d 1126, 1150 (9th Cir. 2003).

Nineteenth Cause of Action
(Card Agreement (Credit Cards) –Violation of Bus. & Prof. Code 17200 et seq.
Due To Unfair Practice

132. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1, 5, 6-16, 22-47, 50-51, 54-61, 65, 670-70, 72, 82-83, 105(a)-(e), 118, and 129-131 as though fully set forth herein.

133. American Express' credit card card agreement and/or its specified terms (excluding the arbitration provision), due to its unconscionability and illegality, is an unfair practice that either "offends an established public policy [as represented by Civil Code §§ 1670.5, 1668 and/or 3513] or ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," [Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal.App.4th 700, 718-719, 113 Cal.Rptr.2d 399 (2001)], or which violates public policy tethered to specific constitutional, statutory or regulatory provisions such as Sections 1670.5, 1668, and/or 3513. Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 187, 83 Cal.Rptr.2d 548, 973 P.2d 527.

134. An unconscionable contract or contract provision or term is, as a matter of law, an unfair practice under the UCL. See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, 20 Cal.4th at 183; People v. McKale, 25 Cal.3d 626, 683-84 (1979); Smith v. State Farm Mutual Automobile Ins Co., supra, 93 Cal.App.4th at 719; State Farm Fire & Casualty Co. v. Superior Court, 45 Cal.App.4th 1093, 1104, 53 Cal.Rptr.2d 229 (1996); Lyddon v. Rocha-Albertsen, 2006 U.S.Dist.LEXIS 78957 (E.D. Cal. 2006); Ting v. AT&T, 182 F.Supp.2d 902, 921-22, aff'd in part, rev'd on other grounds in part, 319 F.3d 1126, 1150 (9th Cir. 2003).

Twentieth Cause Of Action
(Declaratory Judgment As To All Cards)

135. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1-134 as though fully set forth herein.

136. An actual controversy has arisen and now exists between Plaintiffs and American Express concerning the unconscionability and illegality of American Express' card agreement and arbitration provision contained in that card agreement, respectively, that is common to all charge cards, credit cards, gift cards, and dining cards issued by American Express for which a fee is paid by the card holder. Plaintiffs take the position that the card agreement and the arbitration provision contained therein are unconscionable and illegal under controlling California and Ninth Circuit law and precedents. American Express takes the obverse position claiming that its card agreement and its arbitration provision contained therein is conscionable and legal.

137. Plaintiffs desire a judicial determination of their rights and duties, and a declaration that the arbitration provision and/or the card agreement and/or specified terms of the card agreement are unconscionable, illegal and unenforceable.

138. A judicial determination is necessary and appropriate at this time under the circumstances in order that Plaintiffs may ascertain their rights and duties.

Class Allegations

139. The Plaintiffs are members of classes of consumers and residents of California, respectively, and the members of these classes of consumers and residents of California are similarly situated and similarly affected by the acts of American Express.

140. Pursuant to Fed.R.Civ.P. 23(b)(2) and, alternatively (b)(3)(insofar as an award of equitable statutory and non-statutory restitutionary and injunctive relief is secondary to any punitive damages monetary award), Plaintiffs seek certification of the following classes and subclasses:

(a) Relative to all UCL and fraud causes of action,

(1) All persons and entities residing in California who, according to the records of American Express, have been issued and have paid or are paying annual fees to American Express for American Express charge cards, credit cards, Gift cards, and/or Dining Cards issued by American Express Travel Related Services, Inc. (including its subsidiaries, affiliates, or licensees) bearing the American Express name or the American Express trade or service mark or logo pursuant to a card agreement containing the same or similar terms and provisions as those contained in Exs. 15, 25, 26, and 29 during any part of the period covered by the applicable limitations period and pendency of this action to the time of final judgment.

(b) Relative to all CLRA causes of action,

(1) All consumers residing in California who for personal or household use have been, according to the records of American Express, been issued and have paid or are paying annual fees to American Express for American Express charge cards issued by American Express Travel Related Services, Inc. (including its subsidiaries, affiliates, or licensees) bearing the American Express name or the American Express

1 trade or service mark or logo pursuant to a card member agreement
2 containing the same or similar terms and provisions as those contained
3 in Exs. 15 and 26 during any part of the period covered by the applicable
4 limitations period and pendency of this action to the time of final
5 judgment.

6 (2) All consumers residing in California who for personal or
7 household use have been, according to the records of American Express,
8 been issued and have paid or are paying annual fees to American
9 Express for American Express credit cards issued by American Express
10 Travel Related Services, Inc. (including its subsidiaries, affiliates, or
11 licensees) bearing the American Express name or the American Express
12 trade or service mark or logo pursuant to a card member agreement
13 containing the same or similar terms and provisions as those contained
14 in Exs. 15 and 26 during any part of the period covered by the applicable
15 limitations period and pendency of this action to the time of final
16 judgment.

17 (3) All consumers residing in California who for personal or
18 household use have or will, according to the records of American
19 Express, purchased American Express Gift Cards and/or Dining Cards
20 issued by American Express Travel Related Services, Inc. (including its
21 subsidiaries, affiliates, or licensees) pursuant to a card agreement
22 containing the same or similar terms and provisions as those contained
23 in Ex. 25 and 29 during any part of the period covered by the applicable
24
25

1 limitations period and pendency of this action to the time of final
2 judgment.

3 141. Excluded from each class of which Plaintiffs seek certification (a) all officers and
4 employees of American Express Company, including its subsidiaries, affiliates, or licensees; (b)
5 persons who, as of the date of class certification, have pending in any court an individual action
6 against any Defendant named in this action, or who have obtained a judgment against any
7 Defendant named in this action, or who have executed a release in favor of any Defendant
8 named in this action which encompasses, adjudicates or releases all of the certified claims in this
9 action; (c) judges, court personnel, and jurors hearing this matter.

10 142. It is impracticable to bring all members of the above classes, as individual plaintiffs,
11 before this court for the reason that the members of the classes are too numerous, representing as
12 they do the fee-paying holders of American Express charge cards, credit cards, gift cards, and
13 dining cards residing in California, the number of which are estimated at approximately
14 4,000,000 for the charge cards and credit cards, and 100,000 for the Gift Cards and Dining
15 Cards, respectively.
16

17 143. Each member of the Plaintiff classes has suffered an injury of the type and size to that
18 suffered by Plaintiffs and that denial of class relief would result in unjust advantage to
19 Defendants.

20 144. Plaintiffs are informed and believe, and thereon allege, that the questions of law or fact
21 common to the classes are substantially similar and predominate over the questions affecting the
22 individual members in that the predominating and primary issues presented are ones of law (i.e.,
23 a common core of salient facts and legal theories relating to the unconscionability and illegality
24 of the common “form” arbitration provision and common “form” card agreement, respectively,
25

1 imposed by American Express on its card holders) and the relief sought is identical (i.e.,
2 restitutionary relief, injunctive relief, and common pool of punitive damages).

3 145. The claims and defenses of the Plaintiffs are typical of the claims and defenses of the
4 classes in that there is a commonality of interests by and between Plaintiffs and the members of
5 the classes they seek to represent that is patent in that (a) the nature of the claims are identical
6 and predominant common questions of law or fact are exclusively involved (the
7 unconscionability of terms in the arbitration provision and card agreement, respectively, that are
8 common to all of the form provisions and agreements imposed by American Express on a “take
9 it or leave it” basis on the card holders and, as to the fraud cause of action, common reliance on
10 the misrepresentations by Plaintiffs and class members exists); (b) the Plaintiffs, as class
11 representatives, are typical of the classes and have only claims and defenses that are typical of
12 those of the respective classes in that, for instance, the claims for and quantum of injunctive and
13 restitutionary relief are identical for each member of each class (i.e., the amount of the fee(s)
14 paid by them) or easily subject to proof without separate adjudications.
15

16 146. The interests of the respective classes will be fairly and adequately protected by the
17 plaintiffs for the reasons that the success or failure of the Plaintiffs is identical with the success
18 or failure of each of the members of the classes, no antagonisms exist between the interest of the
19 Plaintiffs and the classes, Plaintiffs are committed to the vigorous prosecution of this action, and
20 Plaintiffs’ counsel is experienced and knowledge in the area of consumer protection law and
21 class actions.
22

23 147. A risk exists that prosecution of separate actions by Plaintiffs and the members of the
24 respective classes they seek to represent would create a risk of incompatible or inconsistent
25

1 adjudications and incompatible standards of conduct for Defendant or create a risk of prejudice
2 to individual class members not parties to the action.

3 148. American Express has acted or refused to act on grounds generally applicable to the
4 class in that it has a common form arbitration and card agreement, respectively, and uniformly
5 refuses to modify its agreement and arbitration provision on grounds generally applicable to the
6 class.

7 149. The injunctive, restitutionary, and/or declaratory relief sought by the individual Plaintiffs
8 would benefit the class as a whole.

9 150. Common questions of fact or law involving the class claims predominate over questions
10 affecting individual members and a class action is the superior method for a fair and efficient
11 adjudication of the case.

12 151. Plaintiffs are advised and believe, and on that basis allege, that as each of the classes and
13 sub-classes as alleged no notice is required in that the statutory injunctive and restitutionary
14 relief as well as declaratory relief sought predominate over any claim for monetary damages in
15 the form of punitive damages.
16

17 **Prayer For Relief**

18 WHEREFORE, Plaintiffs pray on behalf of themselves and all other consumers and
19 residents, respectively, who are similarly situated and constitute the respective classes, which
20 Plaintiffs seek to represent judgment as follows:
21

22 a. For an order requiring Defendants to show cause why they should not be enjoined as
23 hereinafter set forth, during the pendency of this action;

24 b. For a temporary restraining order, a preliminary injunction and a permanent injunction,
25 all enjoining Defendants and their respective agents, servants, parents, subsidiaries, assigns and

1 employees, and all persons acting under, in concert with, or for it from enforcing the Arbitration
2 Provision of the American Express card agreement found to be unenforceable because of
3 unconscionability or illegality.

4 c. For a temporary restraining order, a preliminary injunction and a permanent injunction,
5 all enjoining Defendants and their respective agents, servants, parents, subsidiaries, assigns and
6 employees, and all persons acting under, in concert with, or for it from enforcing the American
7 Express card agreement found to be unenforceable because of unconscionability or illegality, or
8 fraud.

9 d. For non-statutory and/or statutory restitution (including disgorgement of profits).

10 e. For punitive damages relative to the CLRA and fraud causes of action, respectively.

11 f. For declaratory judgment.

12 h. For attorney's fees and costs as authorized by statute as to the CLRA claims and by
13 precedent as to the respective UCL and fraud causes of action.

14 i. For such other and further relief as the court may deem proper.

15
16
17 Dated: September 17, 2007

Respectfully submitted,

18
19
20
21 _____
22 Matthew S. Hale
23 Attorney for Plaintiffs
24
25